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TREATISE

ON

OBLIGATIONS,

CONSIDERED IN A

MORAL AND *LEGAL* VIEW.

Translated from the French of POTHIER.

IN TWO VOLUMES.

VOLUME THE FIRST.

NEWBERN, N. C.
MARTIN & OGDEN.
1802.

ENTERED ACCORDING TO LAW.

362255

IT *is imagined, that this Treatiſe will find a ſufficient recommendation in the opinion which Sir* WILLIAM JONES *expreſſes, of the writings of its author.*

"At the time when M. Le Brun wrote, the learned M. POTHIER was compoſing ſome of his admirable *treatiſes* on the different ſpecies of expreſs, or implied, *contracts*: and here I ſeize with pleaſure an opportunity of recommending [illegible]e treatiſes to the *Engliſh* lawyer, exhorting him to read them again and again; for, if his great maſter Littleton has given *him*, as it muſt be preſumed, a taſte for luminous method, appoſite examples, and a clear manly ſtyle, in which nothing is redundant, nothing deficient, he will ſurely be delighted with works, in which all theſe advantages are combined, and the greateſt portion of which is law at *Weſtminſter* as well as at *Orleans*: for my own part, I am ſo charmed with them, that, if my undiſſembled fondneſs for the ſtudy of juriſprudence were never to produce any greater benefit to the public, than barely the introduction of POTHIER to the acquaintance of my countrymen, I ſhould think that I had in ſome meaſure diſcharged the debt, which *every man*, according to lord Coke, *owes to his profeſſion*."

LAW OF BAILMENTS, *p.* 41. *Boſt. Edit.*

Newbern, January 22*d*, 1892.

ERRATA.

Page.	Line.	
4,	17,	*for* being, *read* not being.
24,	24,	intereſts, — intereſt.
38,	28,	for, — with.
	29,	obligation, — agreement.
	36,	for, — with.
43,	11,	in, — on.
51,	12,	ſecond, — third.
97,	5,	for — this.
110,	23,	them, — it.
211,	30,	debt, — debt is.
224,	12,	expreſſion, — exception.
229,	37,	are — are not.
276,	25,	ſhare — have.
326,	9,	is — he is.

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A

TREATISE

ON

OBLIGATIONS.

PRELIMINARY ARTICLE.

1. THE term *Obligation* has two ſignifications.

In its moſt extenſive ſignification, *lato ſensu*, it is ſynonymous with the term *duty*, and comprehends *imperfect*, as well as *perfect* obligations.

We call *imperfect* obligations, the obligations for which we are accountable to God alone, and which give to no man the right of requiring the performance of them. Such are the duties of charity, of gratitude. Such is, for example, the obligation of giving alms from our ſuperfluities. This is an actual obligation, and the rich ſin when they fail to perform it. Yet it is an imperfect obligation, becauſe for the performance of it they are accountable to God alone. When they perform it, the poor, to whom they give alms, do not receive a debt, but a mere benefit. It is ſo with regard to the duties of gratitude. He, who has received a ſignal benefit, is bound to render his benefactor all the ſervices of which he is capable, when he finds the opportunity. He ſins and diſhonors himſelf, when he fails. Yet his benefactor has no right of requiring thoſe ſervices from him, and when they are rendered, this benefactor receives in his turn a benefit.

If my benefactor had a right to require from me, that I should render him, on the same occasion, the same services which he rendered me, it would no longer be a benefit I had received from him; it would be an actual commerce: and the services I should render him would no longer be *gratitude* on my part; gratitude being essentially voluntary.

The term *Obligation*, in a sense more proper and less extensive, comprehends only perfect obligations, which are called also *personal engagements*, giving to him, with whom they are contracted, the right of requiring the performance of them: and it is of this kind of obligation, that we mean to speak in this treatise.

Jurists define these obligations or personal engagements, "a bond of right, binding us to another, to give, do, or refrain from doing, something." *Vinculum juris, quo necessitate adstringimur, alicujus rei solvendae.* Instit. tit. de Oblig. *Obligationum substantia consistit ut alium nobis obstringat, ad dandam aliquid, vel faciendum, vel praestandum.* L. 3, ff. *de Oblig.*

These words, *vinculum juris*, are applicable to the civil obligation alone. The mere natural obligation which is *solius aequitatis vinculum*, is also, although in a sense less proper, a perfect obligation; for it gives, if not a legal, at least a moral right of requiring the performance of it: while the imperfect obligation does not give even that right. See *infra*, *n.* 197.

We shall divide this treatise into four parts. We shall see in the first part, what belongs to the essence of obligations, and what are their effects.

In the second, the different divisions and different kinds of obligations.

In the third, the manner in which obligations are extinguished, and the exceptions or pleas, with the prescriptions against the rights which result from them.

We shall add a fourth part, on the proof as well of obligations, as of the performance of them.

FIRST PART.

Of what belongs to the essence of obligations, and of their effects.

CHAPTER THE FIRST.

Of what belongs to the essence of obligations.

2. IT is of the essence of all obligations, that there be, I. a cause from which the obligation arises, II. persons between whom it is contracted, III. some thing which is the object of it.

The causes of obligations are contracts, quasi-contracts, torts and quasi-torts; sometimes the law or equity alone.

We shall treat, I. of contracts, which are the most frequent causes from which obligations arise.

II. Of the other causes of obligations.

III. Of the persons between whom they are contracted.

IV. Of the things, which may be the object of them.

SECTION THE FIRST.

Of contracts.

I. We shall see what a contract is, in what it differs from a pollicitation; and what things are principally to be considered in every contract. II. We shall relate the different divisions of contracts. III. We shall treat of the different defects which may be found in them. IV. Of the persons capable or incapable of contracting. V. Of what may be the object of contracts. We shall see that it must be something concerning the contracting parties; according to the rule that *one cannot validly stipulate or promise but for himself*, a rule which we shall endeavour to unfold and explain. VI. We shall treat of the effects of contracts. VII. We shall give some rules for their interpretation. VIII. We shall speak of the oath which the parties sometimes add to their agreements.

Article the First.

What a contract is; in what it differs from a pollicitation; and what things are principally to be considered in every contract.

§. I.

What a contract is.

3. A contract is a kind of agreement. To know what a contract is, it is then previously requisite to know what an agreement is.

An agreement or a pact (for these are synonimous expressions) is the assent of two or more persons, to form an engagement betwen them, or to dissolve or modify one already formed. *Duorum vel plurium in idem placitum consensus. L.* 1, §. 1, *ff. de Pact.* Domat, *p.* 1, *l.* 1, *t.* 1.

The kind of agreement, which has for its object to form some engagement, is what is called a *contract.* The principles of the Roman law, on the different kinds of pacts and the distinction between contracts and simple pacts, being grounded on natural law and being very distant from its simplicity, are not admitted in our jurisprudence. Those who are curious to know them, may consult our work on the Pandects.

Hence it follows, that with us a contract ought not to be defined, as it was by the interpreters of the Roman law, *conventio nomen habens a jure civili vel causam*: but it ought to be defined an agreement, by which both parties promise reciprocally, or only one of them promises and engages to the other, to give, do or refrain from doing, something.

I have said *promise and engage*; for it is only the promises which we make, with an intention of engaging and binding ourselves and of conferring on the other party the right of requiring the performance of them, that constitute a contract or an agreement.

There are other promises, which we make with good faith and with the actual intention to perform them, but without an intention of engaging or binding ourselves and conferring on the party, to whom they are made, the right of requiring their performance. This happens when he, who promises, expressly declares that he does not mean to bind

himself, or when this is fairly to be implied and results from the circumstances, or from the relation in which the parties stand to each other. For example; when a father promises to his son, who studies law, to give him money for a jaunt of pleasure during the vacations, if he studies well: it is evident that the father, in making this promise, does not mean to contract, with his son, an engagement properly speaking.

These promises produce indeed an imperfect obligation to perform them, provided nothing happen which, had it been foreseen, would have prevented the making of the promise: but they form no engagement, and therefore no contract.

§. II.

In what a contract differs from a pollicitation.

4. The definition which we have given of a contract points out this difference. A contract includes a concurrence of the will of two persons at least, one of whom makes and the other accepts the promise. A pollicitation is a promise which is not yet accepted by him to whom it is made. *Pollicitatio est solius offerentis promissum*; L. 3, ff. *de Pollicitat.*

The pollicitation, according to the principles of mere natural law, produces no obligation, properly speaking. He who makes this promise, may revoke it, as long as it is unaccepted by him to whom it is made. For there can be no obligation without a right acquired, by the person in whose favour the obligation is contracted, against the person who contracts it. Hence as I cannot, by my own will alone, transfer to another the property of my goods, if his will does not concur in the acquisition of it: so I cannot, by my promise, transfer to another a right on my person, until his will concur in the acquisition of it, by his acceptance of the promise. *Grotius de j. b. & p. l.* 2, *cap.* 11, *v.* 3.

Although the pollicitation be not obligatory, according to the principles of mere natural law, the civil law, adding to the natural, had, among the Romans, rendered obligatory in two cases the pollicitations of a citizen to his city. I. When he had just cause to make them; *puta*, in consideration of some municipal magistracy, conferred on him *ob ho-*

norem. II. When he had begun to carry them into execution. *L.* 1, §. 1 & 2, *ff. d. tit.*

It is uſeleſs to enquire now, whether pollicitations are obligatory in our law. For as the ordinance of 1731, *art.* 3, has declared that there ſhall be but two ways of diſpoſing gratuitouſly of one's goods, by donation *inter vivos* and *by teſtament*, it follows that it rejects the pollicitation.

§. III.

Of the three things which are to be diſtinguiſhed in every contract.

5. Cujas diſtinguiſhed in contracts only the things which are of their eſſence and thoſe which are accidental to them. The diſtinction made by ſeveral writers of the ſeventeenth century is much more correct. They diſtinguiſh three different things in every contract, thoſe which are of the eſſence of the contract, thoſe which are of its nature and thoſe which are accidental to it.

6. I. The things, which are of the eſſence of a contract, are thoſe without which it cannot exiſt. On the abſence of any of them, there is either no contract at all, or a contract of another kind.

For example. It is of the eſſence of a contract of ſale, that there be a thing ſold, and a price for which it is ſold. Therefore, if I had ſold you a thing which we knew not had then ceaſed to exiſt, there would be no contract. L. 57, ff. *de Contr. empt.* For there cannot be a contract of ſale, without a thing that is ſold. Likewiſe, if I ſell you a thing at the price at which my kinſman, who bequeathed it to me, bought it, and it is found that the thing was not ſold but given to him, there will be no contract; becauſe there is not a price, which is of the eſſence of the contract of ſale.

In the above caſes, the abſence of one of the things which are of the eſſence of the contract, prevents there being any contract: ſometimes it only changes the nature of the contract.

For example. It being of the eſſence of the contract of ſale that there be a price, which conſiſts in a ſum of money which the buyer pays or engages to pay to the ſeller, if it

be mentioned in an agreement made with you that I ſell you my horſe for a book which you engage to deliver me as the price of the horſe, this agreement will not conſtitute a contract of ſale, becauſe ſuch a contract cannot exiſt without a price conſiſting in a ſum of money. Yet the agreement is not void; it conſtitutes another contract, viz. a contract of exchange.

Likewiſe, it being of the eſſence of the contract of ſale, not indeed that the ſeller ſhould bind himſelf preciſely to transfer to the buyer the property of the thing ſold, in caſe he is not the owner of it, but at leaſt that he ſhould not retain it, if he is; if we agreed that I ſhould ſell to you a certain piece of land for a ſpecified ſum and a rent which you engage to pay me, and I agree that you ſhall enjoy the premiſes under a condition that the property of the land ſhall remain with me, this agreement will not contain a contract of ſale, for it is contrary to the eſſence of ſuch a contract, that the ſeller ſhould retain the property of the thing ſold; but it will contain a contract of leaſe. *Labeo, L.* 80, §. 3, *ff. de Contr. empt. Nemo potest videri rem vendidisse de cujus dominio id agitur, ne ad emptorem transeat; sed hoc aut locatio est, aut aliud genus contractus.*

Likewiſe, it being of the eſſence of the contracts of loan, mandate and depoſit, that they be gratuitous, if I lend you a thing on condition that you pay me a certain ſum for the uſe of it, this will not be a contract of loan, but another kind of contract, viz. a contract of hire. For the ſame reaſon, if in accepting the power of attorney which you gave me, or the depoſit of a thing which you entruſted me with, I have ſtipulated for the payment of a ſum of money as a compenſation for my care in the management of your concerns or the ſafe keeping of the depoſit, this contract will not be a contract of mandate or of depoſit, but a contract of hire; by which I hire to you my care in the management of your concerns or the keeping of the depoſit.

7. II. The things, which are only of the nature of the contract, are thoſe which, without being of the eſſence of the contract, make part of it, although the parties did not

mention them; it being of the nature of the contract that ſuch things be included and implied in it.

Theſe things hold a middle rank between the things which are of the eſſence of the contract and thoſe which are accidental to the contract; and they differ from both.

They differ from thoſe which are of the eſſence of the contract in this, that the contract may exiſt without them and they may be excluded by the agreement of the parties. They differ from the things which are accidental to the contract in this, that they make part of the contract without having been expreſsly agreed upon. This will be illuſtrated by examples. In the contract of ſale the obligation to warrant, which the ſeller contracts to the buyer, is of the nature of the contract. Therefore the ſeller contracts, by the ſale, this obligation to the buyer, although the parties do not expreſsly agree on it, and not a word be ſaid on this ſubject in the contract. But this obligation being of the nature, and not of the eſſence of the contract of ſale, the contract of ſale may exiſt without this obligation; and if by the contract it be expreſsly agreed that the ſeller ſhall not be bound to warrant the thing ſold, the agreement will be valid and the contract will, not the leſs, be a contract of ſale, although the ſeller is not bound to warrant.

It is alſo a thing which is of the nature of the contract of ſale, that as ſoon as it has received its perfection, by the aſſent of the parties, although before the delivery, the thing ſold be at the riſk of the buyer, and that if it happen to perish, without the fault of the ſeller, the loſs ſhould fall on the buyer, who is not on this account diſcharged from paying the price. But as this is of the nature only, and not of the eſſence of the contract of ſale, the parties, in making the contract, may agree on the contrary.

It is of the nature of the contract of loan to uſe, that the borrower be liable for the ſlighteſt fault with regard to the thing loaned. He contracts this obligation from the nature of the contract itſelf, and without its being expreſſed by the parties, at the time of the contract. But as this obligation is of the nature and not of the eſſence of the con-

tract of loan to uſe, it may be excluded by a clauſe of the contract, and it may be agreed that the borrower ſhall only be bound to uſe good faith in the preſervation of the thing and that he ſhall not be liable for any accident which may happen through his negligence, but without malice.

It is alſo of the nature of the ſame contract, that the loſs of the thing lent, when it happens *vi majore*, from a cauſe not within the control of the borrower, ſhould fall on the lender. Yet this being of the nature only and not of the eſſence of the contract, the borrower may, by a ſpecial clauſe, be charged with this riſk till he reſtore the thing.

A number of other examples might be adduced relating to the different kinds of contracts.

8. III. The things which are accidental to the contract are thoſe which not being of the nature of the contract, are part of it only, on account of ſome ſpecial clauſe added to the contract.

For example. The time allowed by the contract for the delivery of the thing or the payment of the ſum due, the liberty of paying the latter by inſtalments, or giving ſomething elſe in lieu of it, or of paying to ſome other perſon than the creditor and the like, are things accidental to the contract; for they only make part of the contract, inaſmuch as they are ſtipulated in ſome clauſe added to the contract.

In the contract of ſale of an annuity, the obligation by which the ſeller makes himſelf anſwerable for the ſolvency of the debtors, as long as the annuity ſhall laſt, is a thing accidental to the contract; for the ſeller does not contract this obligation from the nature of the contract: he only contracts it, by virtue of a ſpecial clauſe added to the contract: and this clauſe, although frequently inſerted in contracts of ſale of annuities, ought to be expreſſed; otherwiſe the want of it cannot be ſupplied by implication or preſumption.

Various other examples might be adduced.

Article II.

Division of contracts.

9. The diviſions which the Roman law makes of contracts, into named and unnamed contracts, contracts *bonæ fidei* and *stricti juris*, do not hold with us.

The diviſions admitted by our juriſprudence are I. into contracts ſynallagmatic, or bilateral, and contracts unilateral.

The ſynallagmatic or bilateral, are thoſe in which each of the contracting parties binds himſelf to the other, as in contracts of ſale, hire, &c.

Unilateral are thoſe in which one of the parties only binds himſelf to the other, as in the loan of money.

Among ſynallagmatic contracts, we diſtinguiſh thoſe which are abſolutely ſo, and thoſe which are ſo, qualifiedly. The contracts, which are perfectly ſynallagmatic or bilateral, are thoſe in which the obligation, which each party contracts, is equally a principal obligation of the contract; as contracts of ſale, hire, partnerſhip, &c. For example. In the contract of ſale, the obligation, which the ſeller contracts to deliver the thing, and that which the buyer contracts to pay the price, are equally principal obligations of the contract. The contracts which are qualifiedly ſynallagmatic, are thoſe in which the obligation of one party alone is the principal obligation of the contract. Such are the contracts of mandate, depoſit, loan to uſe and pledge. In theſe contracts, the obligation which the mandatary contracts to account, thoſe contracted by the depoſitary, borrower or creditor, to reſtore the thing depoſited, lent or pledged, are the only principal obligations of the contract. Thoſe which are contracted by the mandator, depoſitor or debtor, are but incidental obligations reſulting from the contract, from the expences incurred by the other party, in the execution of the mandate, or the preſervation of the thing depoſited, lent or pledged.

The action which ariſes from the principal obligation is called *actio directa;* that which ariſes from the incidental obligation is called *actio contraria.*

10. II. Contracts are divided into those which are formed, by the mere assent of the parties, and are therefore called *consential* contracts, as sale, hire, mandate, &c. and those in which something else is requisite, as contracts for the loan of money or of things to be used, deposit and pledge, which, from the nature of the contract, require the delivery of the thing that is the object of the contract: These are called *real* contracts.

Although the mere assent of the parties suffices for the perfection of consential contracts, yet if the parties in a sale, or hire, or any other kind of bargain, agree to have an instrument respecting it made by a notary, with a view that their bargain be not concluded and perfect, till the instrument shall have received its legal form by the signature of the parties and the notary, the bargain will not be complete until the notarial instrument shall become so; and the parties, although they did perfectly agree to the terms of the bargain, will be at liberty to recant at any time before the notarial instrument is subscribed. *L. Contractus*, 17, *cod. de fid. instr. Instit. tit. de contr. empt.*

But if in this case the instrument is required for the perfection of the contract, it is not from the nature of the contract, which of itself requires nothing but the assent of the parties; it is because the contracting parties have required it, and because it is lawful for the parties to a contract to render their obligations dependent on what condition they please.

It must be observed that an agreement, that a notarial instrument evidencing the bargain shall be drawn, does not of itself render the perfection of the bargain dependent on the instrument. It ought to appear that the intention of the parties was that it should depend on this. Therefore it has been adjudged, in a case reported by *Mornac*, *ad. d. l.* 17. that a party could not recede from a contract of sale, reduced to writing with a clause that there should be a notarial instrument, although no such instrument had been executed: for it could not be concluded from this clause that the parties had intended to render the completion of their bargain dependent on the execution of a

notarial inſtrument, which might have been thought of in order to provide a lien on the party's lands, which ſuch an inſtrument procures, or to obviate the danger of loſing a private paper.

But when the agreement is oral, it is eaſier for the party who is preſſed to comply with it, to avoid it by contending that it was an inchoate bargain, which was not to have its perfection before the execution of the notarial inſtrument, which the parties had agreed to procure. For as contracts, the object of which exceed in value the ſum of £.100, cannot be proved by witneſſes, and there being in this caſe no proof of the bargain but this declaration of the party, it muſt be taken *in toto*, as we ſhall ſee in the fourth part of this work, *n.* 799.

When a contract is reduced to writing, without being ſubſcribed by all the parties named in it, ſome refuſing to ſubſcribe, thoſe who have ſubſcribed may retract, and will be believed in their declaration that in cauſing the writing to be drawn, their intention was to render the completion of the bargain, dependent on that of the writing. On this principle, the ſale of an office made by the plaintiff, a widow, as well in her own right as in quality of tutrix of her infant ſon, was adjudged imperfect, in a caſe reported by *Soefve*, *t.* 1. *cent.* 4. *chap.* 75. It was made in writing, and the defendant who had ſubſcribed it, was held not to be bound by it; becauſe the writing was incomplete, not being ſubſcribed by the curator of the infant, who was mentioned in it, although unneceſſarily, as a party on behalf of the infant.

12. The third diviſion of contracts, is into contracts of intereſt on both ſides, contracts of beneficence, and mixt contracts.

Contracts of intereſt on both ſides are thoſe which are made for the reciprocal intereſt and advantage of both parties. Such are contracts of ſale, exchange, hire, annuity, partnerſhip and an infinity of others.

Contracts of beneficence are thoſe which are made only for the advantage of one of the contracting parties.

ch are the loan to uſe, the loan to conſume, depoſit an mmate.

The contracts by which one of the parties who confe n a benefit on the other, requires from him ſomething ual to the value of what he gives him, are called mutual cts. Such are gifts made under a charge or the like.

13. Contracts of interest on both ſides are ſubdivided to commutative contracts and aleatory contracts.

Commutative contracts are thoſe in which each of the ntracting parties gives and receives ordinarily the equiva nt of what he gives. Such is the contract of ſale. The ller ought to give the thing ſold and receive the price, ich is the equivalent of it; the buyer ought to give the ice and receive the thing ſold, which is the equivalent.

They are diſtributed into four claſſes, *Do ut des*, *Facio ut facias*, *Facio ut des*, *Do ut facias*.

Aleatory contracts are thoſe in which one of the parties hout giving any thing on his part, receives ſomething om the other not as a liberality, but as the price of a risk ich he runs. All games are contracts of this nature, as e wagers and contracts of inſurance.

14. A fourth diviſion of contracts is into principal contracts, and acceſſory contracts. Principal contracts are thoſe ich intervene principally and for themſelves. Acceſſory ntracts are thoſe which intervene to inſure the execution another contract. Such are contracts of ſuretyſhip and pledge.

15. A fifth diviſion of contracts is into thoſe which are bjected by the municipal law to certain rules or forms and ſe which are regulated by natural law alone.

Thoſe which are ſubjected, among us, to certain rules d forms are the contracts of marriage, donation, bill of exange, annuity. Other agreements are not ſubjected, with s, to any particular form or arbitrary rule preſcribed by the unicipal law, and provided they contain nothing contrary law or good morals, and they be entered into by perns capable of contracting, they are obligatory and give rise

to an action. If our laws require that those, the object of which exceeds in value the sum of 100 livres, be reduced to writing, it is only with the view to regulate the manner in which they are to be proved, when their existence is denied. But it is not the intention of the law to make writing the substance of the agreement. The agreement is valid without, and the parties, who do not deny that it intervened, may be compelled to execute it. The decisory oath may be deferred to the party who denies it. The writing is necessary to the proof, but not to the substance of the agreement.

Article III.

Of the different defects which may happen in contracts.

16. The different defects which may happen in contracts are error, violence, fraud, lesion*, want of consideration and want of obligation. We will treat of these defects in as many distinct paragraphs.

With regard to the defects that result from the inability of some of the contracting parties, or from what is the object of contracts, we shall treat of these in the following articles.

§. I.

Of error.

17. Error is the greatest defect in agreements. For agreements are formed by the assent of the parties and there can be no assent, when the parties have erred as to the object of their agreement. *Non videntur qui errant consentire;* L. 116. §. 2, *de R. Juris;* L. 57, *de Obligat. & Act.*

Therefore, if one means to sell me a thing, and I mean to receive it as a loan or a gift, there will be in this case no sale, no loan, nor gift. If one means to sell or give me a thing and I mean to buy from him another thing, or to accept the gift of another thing, there is neither sale nor gift. If one means to sell me a thing for a certain price, and I mean to buy it for a less price, in all such cases there is no sale. *Sive in ipsa emptione dissentiam, sive in pretio, sive in quolibet alio, emptio imperfecta est. Si ego me fundum emere putavi*

* See *postea*, §. IV & V.

Cornelianum, tu mihi te vendere Sempronianum putasti; quia in corpore dissensimus, emptio nulla est. L. 9, ff. *de Contr. empt.*

18. Error annuls the agreement, not only when it falls on the thing itſelf, but alſo when it falls on the quality of it which the parties had chiefly in view and which conſtitutes the ſubſtance of the thing. Therefore if, intending to buy a pair of ſilver candleſticks, I buy a pair which you offer me and which I take to be ſilver, while they are only plated copper; although indeed you had no deſign of deceiving me, being *yourſelf* in the ſame error, the agreement will be null: becauſe the error in which I have been deſtroys my aſſent. For the thing which I wiſhed to buy is a pair of ſilver candleſticks; that which you offered me, being a pair of copper candleſticks, cannot be ſaid to be the thing which I intended to buy. *Julian*, L. 41, §. 1, *ff. d. t.* *Ulpian*, L. 14, *ff. d. t.* *Si aes pro auro veneat, non valet.*

It is otherwiſe, when the error falls only on ſome accidental quality of the thing. For example. If I buy, in a bookſeller's ſhop, a certain book, under the falſe perſuaſion that it is excellent, while it is below mediocrity: this error does not deſtroy my aſſent and conſequently not the contract of ſale. The thing, which I wiſhed to buy and which I had in view, is actually the book which the bookſeller ſold to me and not another thing. The error in which I was as to the merit of the book fell only on the motive which induced me to buy it, and does not prevent its being the very book which I wiſhed to buy: and we ſhall ſee ſhortly that error as to the motive does not deſtroy the agreement. It ſuffices that the parties did not err as to the thing which is the object of it, *& in eam rem consenserint.*

19. Does error as to the perſon with whom I contract deſtroy likewiſe the aſſent and annul the agreement? I think that this queſtion ought to be decided by a diſtinction. Whenever the conſideration of the perſon enters into the contract which I wiſh to make, the error as to the perſon deſtroys my aſſent, and conſequently renders the agree ment null. Therefore, if wiſhing to give or lend a thing to Peter, I give or lend it to Paul, whom I miſtake for Peter, the gift or loan is null, for want of aſſent

on my part: for I did not wish to give or lend this thing to Paul, I only wished to give or lend it to Peter. The consideration of the person of Peter entered into the gift or loan I intended to make.

Likewise, if wishing to have a painting made by Natoire, I bargain to have it done with James whom I mistake for Natoire, the bargain is null, for want of assent on my part: for I did not wish to have a painting made by James, but by Natoire. The consideration of the person of Natoire, and of his reputation, entered into the bargain which I wished to make.

Note, however, that if James, who was ignorant that I was mistaking him for Natoire, in consequence of this erroneous agreement made the painting, I shall be bound to take it, and to pay what it may be really worth. But it is not, in this case, the agreement which thus binds me; for this agreement, which is null, cannot produce any obligation. The cause of my obligation in this case is equity, which obliges me to indemnify him whom I have, by my imprudence, led into an error. There arises from this obligation an action, which is called *actio in factum*.

We have seen that error as to the person annuls the agreement, whenever the consideration of the person enters into it.

On the contrary, whenever the consideration of the person with whom I thought I was contracting has not entered into the contract, and I would as willingly have contracted with any other person, as with the one with whom I did contract, the contract ought to be valid. For example. I bought of a bookseller a book in sheets, which he obliged himself to deliver to me bound. Although this bookseller, in selling me the book, thought he was dealing with Peter, whom I resemble, and he called me Peter at the time, and I did not undeceive him; this error in which he was as to the person to whom he sold the book does not annul the agreement, and cannot authorise him to refuse to deliver me the book at the stipulated price, if since the agreement the price of it has risen. For although he thought he

he was selling his book to Peter, yet as it was indifferent to him to whom he sold his ware, it is not precisely and personally to Peter he wished to sell this book, but to the person who would give the price he asked, whoever he might be. Consequently it is proper to say that it was to me, who was that person, to whom he wished to sell his book, and to whom he bound himself to deliver it. *L. 3. ch. 6. n. 7. not. 2.*

20. Does error on the motive annul the agreement? Puffendorf, *l. 3. ch. 6. n. 7.* thinks it does, provided I communicated to the person, with whom I contracted, the erroneous motive that induced me to contract; because, according to his opinion, the parties ought, in this case, to be presumed to have intended to render their agreement dependent on the truth of the motive, as on a sort of condition. He states, as an example, the case in which, on the false report of the death of my horses, I should have bought others, communicating in my conversation with the seller the false news which I had received. He thinks that in such case, on receiving advice of the falsity of the report, I might refuse to comply with the agreement, provided it is yet absolutely executory on both sides, indemnifying the seller for the injury he might sustain from the inexecution of the agreement.

Barbeyrac demonstrates very clearly the fallacy of this reasoning. For if it were true that we had made our agreement dependent on the truth of the intelligence which I had received; the intelligence happening to be false, the agreement would be absolutely void, *defectu conditionis*, and the seller could not claim damages for its inexecution. Barbeyrac afterwards very properly says that this error in the motive does not in any way affect the agreement. Indeed, as in legacies the falsity of the motive which the testator has mentioned, does not affect the legacy and prevent its being valid; because it is not the less true that the testator intended to bequeath, and it cannot be concluded from what he has said as to the motive that induced him to bequeath, that he intended to make the legacy dependent on the truth of the motive, as on a condition, unless this doth otherwise appear: so, and *a fortiori*, it ought to be held with regard

to agreements, that error as to the motive which induced one of the parties to contract, has no influence on the agreement, and does not prevent its validity; becauſe there is much leſs room to preſume that the parties intended to make their agreement dependent on the truth of this motive as on a condition: for agreements ought to be interpreted *prout sonant*, and conditions which can only be annexed to them by the will of both parties, ought to be preſumed with leſs facility than in a teſtament.

§. II.

Of the want of freedom.

21. The aſſent which forms agreements ought to be free. If the aſſent of one of the contracting parties has been extorted by violence, the contract is defective. However, as the aſſent, though extorted by violence, is an aſſent ſuch as it is, *voluntas coacta est voluntas* (gloſſ. ad L. 21. §. 5. ff. *quod met. caus.*) it cannot be ſaid, as in the caſe of error, that there has been abſolutely no contract. There is one, but it is defective, and he whoſe aſſent has been extorted, or his heirs or aſſigns, may have it annulled and reſcinded, by obtaining letters of reſciſſion for this purpoſe.

But if, ſince the violence has ceaſed, he has acceded to the contract either expreſsly, or impliedly, by ſuffering the time of reſtitution (which is ten years ſince the violence ceaſed) to elapſe, the defect of the contract is cured.

22. When the violence has been exerciſed by the perſon with whom I contracted, or when he has participated in it, the agreement is invalid, both according to the municipal law which gives an action to have it reſcinded, and according to natural law. For even if it were ſuppoſed that there reſults an obligation on me towards you from the aſſent which I gave to the contract, although it was extorted by violence; the injuſtice you committed towards me, by exerciſing this violence, obliges you on your part to indemnify me, for what I ſuffer from it; and this indemnification conſiſts in releaſing me from the obligation which you compelled me to contract. Hence it follows that my

obligation, if one be formed cannot be valid or binding to natural law. [illegible]

23. When the violence was [illegible] me to compel me to [illegible] person, with whom the [illegible] contracted, [illegible] finds all [illegible] from what cause [illegible] *est personalis de mente*; [illegible] quem [illegible] alium. Therefore the Emperors have [illegible] *scitis emptor*, which are [illegible] it being indifferent whether he is [illegible] by violence to [illegible] knowledge or not [illegible].

But Grotius contends that it is only from the municipal law that I hold the rescission of my contracts valid would be valid according to the principles of natural law. According to him, it is only the municipal law that [illegible] my assent imperfect on account of the [illegible] which the violence has occasioned. Nature, as it evidently the assent of minors imperfect, when it grants them the rescission of their contracts. [illegible] according to this writer, on the principles of mere natural law, my assent, although given in the [illegible] occasioned by the violence, is no less an actual assent sufficient to produce an obligation. Like that of a minor, although he may not have the maturity of understanding, which is had at a more advanced age.

Puffendorf and Barbeyrac think, on the contrary, that on the principles of mere natural law, when I am compelled by violence to contract, the contract does not bind me at all when the person with whom I contracted had no share in the violence.

Barbeyrac reasons thus. It is true, says he, there is an assent, though extorted by violence, is still an assent, *simile voluntas est voluntas*; and it suffices to render us guilty when we consent, even by constraint, to do what natural law for-

bids, or to abſtain from what it commands. Thus was a chriſtian guilty when he ſacrificed to idols, though compelled by the fear of tortures and death. But although an extorted aſſent be an actual aſſent, it does not ſuffice validly to bind us to give or do what we promiſed; becauſe natural law leaving to our free and ſpontaneous choice all what it allows, it can only be by a free and ſpontaneous choice that we may bind ourſelves to another, to give or do what natural law allowed us to give or not to give, to do or not to do.

The agreement then, is no leſs defective, although the perſon with whom I was compelled to make it, had no ſhare in the violence which was exerciſed upon me; for although he had no ſhare in it, my aſſent is not the leſs imperfect; and it is this imperfection of aſſent which the law regards, when it diſcharges me from the obligation which was pretended to reſult from it: *Neque enim lex adhibenti vim irascitur, sed passo succurrit; & iniquum illi videtur id ratum esse, quod aliquis, non quia voluit, pactus est, sed quia coactus est: nihil autem refert per quem illi necesse fuit; iniquum enim, quod rescinditur, facit persona ejus qui passus est, non persona facientis.* Senec. *controver.* IV. 26.

24. Puffendorf excepts a caſe in which the obligation, although contracted under an impreſſion of fear cauſed by the violence which was exerciſed upon me, is not the leſs valid. It is the caſe in which I had promiſed to a perſon to give him ſomething to induce him to come to my aſſiſtance and deliver me from the violence which another was exerciſing upon me. For example. If being attacked by robbers, I perceive ſome one and promiſe him a ſum of money if he will come and reſcue me from their hands, this obligation, although contracted under an impreſſion of the fear of death, will be valid. *L.* 9. §. 1. *ff. Quod met. causa. Eleganter Pomponius ait: Si quo magis te de vi hostium vel latronum tuerer, aliquid a te accepero, vel te obligavero, non debere me hoc edicto teneri..... ego enim operæ potius meæ mercedem accepisse videor.*

Nevertheleſs, if I had promiſed an exceſſive ſum, I might have my obligation reduced to the ſum, at which the

just reward of the service he had rendered me, might be estimated.

25. The violence which vitiates a contract on account of the want of freedom must, according to the principles of the Roman law, be a violence capable of moving a man of firmness; *metus non vani hominis, sed qui in homine constantissimo cadat*; L. 6, ff. *dicto titulo*.

It is requisite that the party who pretends to have been compelled to contract, should have been intimidated by the fear of a great evil, *metu majoris mali*, L. 5. ff. *eodem titulo*, either in his own person or that of his children, or some other of his near relations; *nam nihil interest in se quis metum patiatur, an in liberis suis*; L. 8, § 3. ff. *d. tit.* It ought to be an evil which was threatened to be imposed instantaneously, unless he did what was proposed; *metum præsentem, non suspicionem inferendi ejus*; L. 9, ff. *dicto titulo*.

When the menaces which another has made use of to compel me to enter into an engagement to him, are only vague threats of a distant evil, by which I suffered myself to be vainly intimidated, although, according to the principles of the Roman law, the contract be not reputed defective on account of the want of freedom in the assent, it is not to be concluded that such a manœuvre ought to remain unpunished and that the contract ought to stand good. The law, 7 ff. *d. tit.* says, indeed, *Si quis meticulosus rem majorem frustra timuerit, PER HOC EDICTUM non restituitur.* But it does not say absolutely *non restituitur*. If the contract does not fail in this case, on account of the absence of what the law judges to be requisite to the freedom of the assent, it is defective on account of the want of good faith, which ought to reign in all contracts.

This manœuvre, of which the person with whom I contracted made use of, is an injustice which binds him to me for the reparation of the injury which it has occasioned me and this reparation consists in the rescission of the contract. *Grotius, dicto loco.*

If it is by the act of a third person that I suffered myself to be intimidated, and he with whom I contracted had no share

in it, the contract will be valid: and I shall have the action *de dolo* against him alone, who intimidated me.

All these principles of the Roman law are very just, and drawn from natural law, except that the one, which admits of no fear as sufficient to vitiate a contract on account of the want of freedom, but that which is capable of moving the firmest man, is too rigid and ought not to be literally received with us. In such a case regard ought to be had to the age, sex and condition of the parties; and a fear, which should not be deemed sufficient to intimidate a man of ripe age and a soldier, and consequently to have occasioned the rescission of the contract which he had made, may be held sufficient, in the case of a woman or an old man. See Bruneman *ad* L. 6, ff. *Quod met. causa*, and the authors he cites.

26. The violence which may give room for the rescission of a contract, ought to be an unjust violence, *adversus bonos mores*; L. 3, §. 1. ff. *d. tit.* Legal means can never pass for a violence of this sort. Therefore a debtor cannot attack a contract, which he has made with a creditor, on the pretence that he was intimidated by the threats of the creditor to exercise the right which he had of imprisoning him; nor even under the pretence that the contract was made in a prison, if the creditor might have lawfully detained him there. The law 22, ff. *Quod met. causa*, which says, *Qui in carcerem quem detrusit ut aliquid ei extorqueret, quicquid ob hanc causam factum est, nullius momenti est*, ought to be understood of an illegal imprisonment. See Wisenbach, *P.* 1, *disp.* 13, *n.* 22.

27. Neither is the fear of displeasing parents, or other persons to whom reverence is due, sufficient to vitiate a contract made under the impression of such fear; L. 22, ff. *de Rit. nupt.* L. 26, §. 1, ff. *de Pign. & Hyp.* Duaren, *ad h. tit.* & Wisenbach, *disp.* 13, *ch.* 13, &c. But if a person who has authority over another, uses ill treatment or threats, to induce him to contract, the contract may, according to circumstances, be liable to rescission.

§. III.

Of fraud.

28. We call fraud every ſpecies of artifice uſed to deceive. *Labeo definit dolum, omnem calliditatem, fallaciam, machinationem, ad circumveniendum, fallendum, decipiendum alterum, adhibitam;* L. 1, §. 2, ff. *de Dol.*

29. When one party has been induced to contract by the fraud of the other, the contract is not abſolutely and eſſentially void; becauſe an aſſent, although obtained by ſurpriſe, is ſtill an aſſent; but this contract is defective, and the party who is ſurpriſed may (within ten years) by obtaining letters of reſciſſion, have it reſcinded; becauſe it is contrary to the good faith which ought to reign in all contracts. Add that if my promiſe binds me to you, the fraud you exerciſed upon me in taking this promiſe from me by ſurpriſe, binds you to indemnify me, and conſequently to diſcharge me from my promiſe.

30. In a moral light, we ought to view as contrary to good faith every thing that deviates, in the leaſt, from the moſt exact and ſcrupulous ſincerity. Mere diſſimulation, as to what concerns the thing, which is the object of the contract and which the party with whom I contract has an intereſt to know, is contrary to good faith. For ſince we are commanded to love our neighbour as ourſelves, it cannot be permitted us to conceal from him, what we would not wiſh ſhould be concealed from us, were we in his place. See this matter treated at large in the *Traite du Contrat de Vente, part.* 2, *ch.* 2; *part* 3, *ſect.* 2.

But courts of juſtice could not liſten to a party who would complain of ſuch ſlight breaches of good faith of which the perſon he contracted with might have been guilty: otherwiſe there would be too many agreements liable to be reſcinded. It would be a ſource of much litigation and of much obſtruction to commerce. It is only what is openly contrary to good faith, that may be regarded by them, as a fraud ſufficient to give occaſion for the reſciſion of a contract, ſuch as the manœuvres and artifices

which one of the parties might have employed, in order to induce the other to contract; and those artifices and manœuvres ought to be fully proved: *Dolum non nisi perspicuis indiciis probari convenit;* L. 6, *Cod. de Dol. mal.*

31. It is only the fraud which has given rise to the contract, that may give occasion for the rescission of it: *viz.* the fraud by which one of the parties has induced the other to contract, who would not have contracted without it. All other frauds, which intervene in contracts, give only a right to damages, as an indemnification for the injury which the party defrauded sustains.

32. It is requisite also, in order that I may claim the rescission of my engagement, that the fraud which has been made use of, in order to induce me to contract, should have been committed by the party with whom I contracted, or at least that he should have participated in it. If it has been committed without his participation, and if I have not besides been enormously injured, my engagement is valid and is not liable to rescission. I have only an action for damages against the party who deceived me.

§. IV.

Of lesion between persons of age.

33. Equity ought to reign in all agreements. Hence it follows that in all contracts of interests in which one of the parties gives or does something in order to receive another thing as the price of what he gives or does, the injury or lesion which one of the parties suffers, although indeed the other party had not recourse to artifice in order to deceive him, is alone sufficient to render the contract defective. For as equity, in matters of commerce, consists in equality, whenever that equality is broken and one of the parties gives more than he receives, the contract is defective, because it is contrary to the equity which ought to reign in it.

Besides the assent of the party injured is imperfect: for he only consented to give what he parted with in the contract, under the false supposition that what he received

in its place was equal to what he gave; and he was in the diſpoſition not to have given it, if he had known that what he received was not worth as much.

But it is to be obſerved, 1. That at the price of things does not conſiſt in an indiviſible point. There is a certain ſpace within which the parties are permitted to range. And there is no leſion and conſequently no iniquity in a contract, unleſs that which one of the parties has received be above the higheſt price of the thing which he gave, or below the loweſt. *Traite du Contrat de Vente*, *n.* 242.

34. II. Although every leſion, whatever it may be, renders contracts iniquitous and conſequently defective, and conſcience requires the juſt price to be ſupplied; yet perſons of age are not admitted to attack their agreements in a court of juſtice on pretence of leſion, unleſs the leſion be enormous. Which has been wiſely eſtabliſhed for the ſafety and freedom of commerce, which requires that agreements may not be eaſily ſet aſide. Otherwiſe one would not dare to contract, leſt the perſon he contracted with, imagining himſelf to be injured, ſhould ſue him.

The leſion is commonly eſteemed enormous when it exceeds the juſt price by one half. The perſon who has ſuffered this leſion, may (within ten years after the contract) by obtaining letters of reſciſſion, demand to have it annulled. *Traite du Contrat de Vente*, *part.* 5, *ch.* 2, *ſect.* 2.

35. There are however certain agreements in which equality is more particularly required. Such are diviſions between co-heirs and co-tenants; *Molin. de Usur. quæst.* 14. *n.* 182.

With regard to theſe agreements, it ſuffices that the leſion ſhould exceed the juſt price by one fourth, to give occaſion for reſtitution.

This is what practitioners call "leſion from the third to the fourth;" *viz.* that which runs between the third and the fourth, which may not go quite to the third, but which ought at leaſt to exceed the fourth. For example. If I have been injured in a diviſion in which I ought to have received

12000 livres for my ſhare, it is not requiſite, in order that I may have relief, that the leſion, which I have ſuffered, ſhould amount to 4000 livres, which is the third of what I ought to have had, it ſuffices that it exceeds 3000 livres, the fourth of it. *Imbert. Enchirid.* title *Diviſion & Partage mal fait.*

36. There are certain agreements againſt which perſons of age cannot be relieved on the ſcore of leſion, however enormous it may be.

Such are tranſactions according to the edict of Francis II. in April, 1560. Thus are called the agreements which take place relatively to pretenſions, for which there is a ſuit depending or about to be inſtituted between the parties.

The reaſon of this edict is drawn from the particular nature of theſe agreements. In the other contracts of intereſt, each of the parties has an intention to receive as much as he gives, and to give up nothing that belongs to him; his aſſent then is not entirely perfect when he is injured, ſince in that caſe it proceeds from the error in which he is, that he receives as much as he gives, and it is on the ground of this defect in his aſſent that he is allowed to ſeek to be relieved from his contract. On the contrary, in tranſactions, from the very nature of theſe agreements, the parties have an intention to avoid a ſuit, even at the expence of what belongs to them.

From this principle it follows that the edict is not to be extended to agreements that would determine no conteſtation, and which for example ſhould contain nothing elſe but a diviſion, although the notary might have ſtyled them *transactions*. For it is not the name which the notary gives to the inſtrument, but the nature of it, which ought to regulate its effect.

37. Neither is relief often granted, on the ſcore of leſion, in contracts in which the price of the thing, which is the object of the contract, being very uncertain, it is difficult or almoſt impoſſible to determine its juſt price, and conſequently to judge whether there is leſion beyond one half of the juſt price.

Such is the contract of ſale of the right to the eſtate of a deceaſed perſon, for the uncertainty of the debts which may appear, renders the value of ſuch rights very uncertain.

Such are all aleatory contracts: for although the riſks which one of the parties takes upon himſelf, be ſomething appreciable in money, it muſt be conceded that it is very difficult to determine the juſt price of them. For this reaſon relief is ſeldom granted, on the ſcore of leſion, on contracts of life-annuities, inſurance, &c.

38. Nor is the purchaſer of an eſtate at more than one half of its juſt price, admitted to relief on the ſcore of leſion alone, when what exceeds the intrinſic value is the price of affection. *Traite du Contrat de Vente, part.* 2, *chap.* 2, *art.* 4, §. 2.

39. Neither are contracts which have perſonal property alone for their object, liable to be ſet aſide on the ſcore of leſion alone, however great it may be. *Coutume d'Orleans, n.* 446.

The reaſon of this right is perhaps that our anceſtors made wealth to conſiſt in real property, and placed little value in moveable things. Hence in our juriſprudence leſs regard is paid to perſonal property. Another reaſon may be drawn from the frequent commerce in this kind of goods, which paſs through a number of hands in a ſhort time. This commerce would be obſtructed, if contracts relating to it were liable to be reſcinded on the ſcore of leſion.

Nor is leſion a cauſe of relief, in the caſe of a leaſe. For a leaſe includes only a diſpoſition of the profits of an eſtate, which are perſonal property.

§. V.

Of lesion with regard to minors.

40. All that has been ſaid before relates to perſons of age only. Minors are relieved againſt their agreements, not only in the caſe of an enormous leſion, but in the caſe of any leſion whatever. And this relief is extended to them, even in thoſe caſes in which we have ſaid that perſons of age are not admitted to be relieved, ſuch as in tranſactions.

The ordinance of 1539, *art.* 134, has limited the time within which minors are to apply for this relief; it does not permit them to be admitted to it after their thirty-fifth year.

Observe that the ordinance has not said *ten years* after coming of age; because there are provinces in which one is of age at twenty, as in Normandy. It has, in this respect, placed every individual on the same footing. They are all relievable till the age of thirty-five years completed.

41. There are certain agreements against which minors capable of contracting, that is to say emancipated, are not relievable any more than persons of age, on the score of lesion alone. Such are their agreements relative to the alienation or acquisition of personal property. *Coutume d'Orleans, art.* 446.

We shall say no more on this head, intending to treat of the subject in a particular treatise.

§. VI.

Of the want of consideration.

42. Every engagement ought to have a lawful consideration. In contracts of interest, the consideration of the engagement which one of the parties contracts, is what the other gives or engages to give, or the risk he takes on himself. In contracts of beneficence, the liberality which one of the parties desires to exercise towards the other, is a sufficient consideration for the engagement he contracts with him. But when an engagement has no consideration, or which is the same thing, when the consideration under which it is contracted, is a false consideration, the engagement is void and the contract which contains it is null. For example. If falsely believing that I owe you a sum of ten thousand livres, which were bequeathed to you by the will of my father, that was revoked by a codicil of which I had no knowledge, I engaged to give you a piece of land in lieu of it; this contract is null, because the consideration of my engagement, which was the discharge of the debt, happens to be false: therefore the falsity of the considera-

tion appearing, not only will you have no action to claim the land from me, but if I had delivered it to you, I should have an action to recover it back. This action is called *condictio sine causa*. See *tit. ff. de Cond. sine causa.*

43. When the consideration for which the engagement has been contracted is contrary to justice, good faith or morality, the engagement is null as well as the contract which contains it. This principle serves for the decision of a question which often occurs. A mortgaged estate is sold under a decree; the mortgagor stipulates with the last bidder that he shall give him a certain sum of money, for which the former will surrender to the latter the title deeds. It is asked whether this be a valid agreement? In other words, whether it be contrary to justice? It certainly is. For the title deeds are accessory to an estate, as the keys are to a house; and it is the nature of accessory things to belong to the owner of the principal thing: *accessoria sequuntur jus ac dominium rei principalis.* The title deeds then belong to the last bidder; for the sale, in transferring to him the property of the estate, transferred to him also that of the title deeds. The mortgagor in mortgaging the land consented that, in case of failure of payment, the creditor might obtain a decree for the sale of it: hence he bound himself to surrender it, with the title deeds, to the last bidder, as if he had sold it himself. He cannot then retain them, without injustice. The agreement, by which he exacts money from the last bidder, has a consideration contrary to justice: this renders it null. Therefore, not only is an action denied to the mortgagor to recover the sum which was promised him, but if the last bidder had paid it, he would have an action to recover it back.

Observe that with regard to this action, care ought to be taken to distinguish, whether the consideration for which some thing has been promised, is contrary to justice or morality, on the part of him alone who stipulates, or on that of both parties. An example of the first case is that which we have just given. When the mortgagor requires from the last bidder a sum of money for the delivery of the deeds, it is the mortgagor alone who acts contrary to justice and good morals; the last bidder on his part does nothing contrary to

them, in promising the money to obtain the deeds which he wants, and which are refused him without it. It is in such a case, and in similar ones, that there is ground to recover back what has been paid in execution of the agreement.

An example of the second case is when an officer promised a sum of money to a soldier, if he would fight a duel with a soldier of another regiment. The consideration of this agreement is contrary to good morals, on both sides. For the officer has not acted the less contrary to law and to good morals, in making this promise, than the soldier in accepting it. This second case agrees with the first in this, that, as in the first, the engagement is null, being made on a consideration which is contrary to good morals: consequently no action can be grounded on it; and the soldier, who fought the duel, cannot recover the sum, which the officer promised him for it. But, this second case differs from the first in this, that if in execution of the contract, altho' it be null, the officer has paid the sum agreed, he will have no right to recover it back, as in the preceding case. For the officer, who has promised the reward, has no less sinned against the laws and good morals than the soldier to whom he promised it. He is unworthy of the assistance of the law to recover it back. This double decision is in the words of the law: *ubi dantis & accipientis turpitudo versatur, non posse repeti dicimus* ..... *Quoties autem accipientis turpitudo versatur, repeti potest*; L. 3, L. 4, §. 2, ff. *de Condict. ob turp. causa.*

44. It is not to be doubted that, according to what we have just established, if I have promised something to another to commit a crime, *puta*, to beat my enemy, I am not legally bound to keep this promise. There is more difficulty, in a moral view. Grotius (II. XI.) contends that such promises are not indeed obligatory, as long as the crime has not been committed, and that until then, he who made the promise may recall it by a contrary order; but that as soon as the crime has been committed, the promise becomes obligatory, as well in *foro legis* as in *foro conscientiæ*. His reason is that the promise is defective, inasmuch as it is an inducement to a crime, and this defect ceases, when the crime is consummated. The defect of this promise ceasing to ex-

it, nothing can prevent its having its effect, which is to bind the perſon who made it to the performance of it. He cites the example of the Patriarch Judah, who performed the promiſe he had made to Thamar.

Puffendorf thinks, on the contrary, that a promiſe made to another to induce him to commit a crime, is no leſs obligatory after it is committed than before. Becauſe the reward of the crime, which the performance of the promiſe contains, after the crime is committed, is ſomething no leſs contrary to natural law and good morals than the invitation to a crime. If, after the crime has been committed, the performance of the promiſe can no longer be an inducement to the commiſſion of it, it may be an inducement to commit others. Beſides, every obligation pre-ſuppoſes a right in the perſon to whom it is contracted. When I have promiſed ſomething to another for committing a crime, his acceptance of the promiſe is no leſs criminal on his part, than the promiſe itſelf on mine: and can a right be acquired by a crime? Can it be believed that natural law favours criminals ſo far as to inſure to them the ſalary of their crimes? Theſe reaſons determine me for the opinion of Puffendorf.

45. I ſubſcribe likewiſe to the deciſion which he afterwards gives; that if I have voluntarily paid, after the commiſſion of the crime, what I had promiſed to another to induce him to commit it, I have no more right to reclaim it in *foro conſcientiæ* than in *foro legis*, although I have paid what I did not owe. It is true, that both the natural and municipal law give a right to reclaim what has been paid, without its being due, when the payment has been made through error. It is ſuppoſed then that the payment was made under a ſort of condition, that there ſhould be a right to claim back what is paid, if it be afterwards diſcovered that the thing was not due. Although this condition was not expreſſed, it is implied. It is conformable to the diſpoſition and will of the perſon who paid. Equity, which forbids us to avail ourſelves of the error of another, in order to enrich ourſelves at his expence, implies this condition. But a like ſuppoſition cannot be made in the caſe we are conſidering. He who pays, does ſo with a perfect know-

ledge of the cauſe for which he pays: he cannot conſequently retain any right to claim back what he voluntarily parts with, having a perfect knowledge of every circumſtance. It is true, it is contrary to natural law that one ſhould be rewarded for a crime, and the repentance which the perſon who committed it ſhould have, ought to induce him to give up the reward which he received for it: but this forms but an imperfect obligation, of the kind of thoſe we ſpoke of in the beginning of this treatiſe, *n.* 1, and which give to no one the right of requiring the performance of them.

46. Has a promiſe a lawful conſideration, when it is made to one to induce him to do or give what he was already bound to do or give? Puffendorf in this caſe diſtinguiſhes very properly the perfect, from the imperfect obligation. When the obligation was only an imperfect obligation, the promiſe has a lawful conſideration and is obligatory. For example. If I have promiſed ſomething to another, if he would render me a ſervice, although gratitude for benefits he had received from me, bound him to render this ſervice to me gratuitouſly, yet the promiſe I made to him has a lawful conſideration and is obligatory. For, as I had no right to require this ſervice from him, he might lawfully, though not decently, require that I ſhould promiſe him ſomething, in exchange for the right, which I had not before, of requiring this ſervice from him.

On the contrary, when the obligation is a perfect obligation, the promiſe which I make to my debtor to give him ſomething, if he will do what he is bound to do, is a void promiſe: for it has an unlawful conſideration, when he required that I ſhould make the promiſe. Such is that of which we have ſpoken before, made by the laſt bidder to the mortgagor to induce him to give up the title deeds of the eſtate which was put down to him. For being bound to give them, it is an exaction on his part to require the promiſe of ſomething for it.

But, although the obligation be a perfect obligation, if the promiſe which I made to my debtor, if he would do what he was bound to do, is a promiſe which I made voluntarily without his requiring it; the promiſe is valid and has

a lawful consideration. The consideration being, in such case, the liberality which I wished to exercise towards him.

§. VII.

Of the want of obligation in the person who promises.

47. It is of the essence of agreements which consist in promising something, that they produce in the person who made the promise an obligation that binds him to perform it. Hence it follows that as there is nothing more contrary to the obligation than the absolute freedom which might be left to him, to do or not to do what he promised; the agreement which would leave this entire freedom, would be absolutely void, on account of the want of obligation. If then, for example, I were to agree with you to give you a certain thing, if I please, the agreement would be absolutely void.

The Roman lawyers thought it was otherwise of an agreement by which one should promise to do something *when he pleased.* They thought that these expressions did not leave it to the choice of the person who made the promise, to do or not to do what he promised; that it only left to his choice the time *when* he should do it; and that thus the agreement was valid and bound his heirs, if he died without performing it. *L.* 46. §. 2 & 3. *ff. de verb. oblig.* But there is room to believe that this subtle distinction would not be admitted with us, and that such an agreement would not be more valid than the other.

48. There is an actual obligation when I promise to give you such a thing, *if I judge it reasonable*; for then it is not left to my choice to give or not to give it to you, since I am bound to do it, in case it be reasonable. *L.* 3. §. 7. *Leg.* 3.

Finally, although I have promised a thing, under a potential condition, so that it depends upon my will to perform it or not to perform it; as if I promised you ten pistoles in case I should go to Paris: the agreement is valid. For it is not entirely in my power not to give them, since I cannot dispense with it, without abstaining from going to Paris.

There is then on my part an obligation and an actual engagement. *L.* 3. *ff. de legat.* 2.

ARTICLE IV.

Of the persons who are capable or not of contracting.

49. The eſſence of the agreement conſiſting, as we have ſaid, in the aſſent, it follows that one muſt be able to aſſent, and conſequently have the uſe of reaſon to be capable of contracting.

Hence it is evident that neither children, ideots nor lunatics, while they continue ſuch, can contract by themſelves: but theſe perſons may contract by the intervention of their tutors or curators, as we ſhall ſee in the following articles.

It is evident that ebriety, when it is ſuch as to take away the uſe of reaſon, renders the perſon who is in that condition, while it continues, unable to contract; ſince it renders him incapable of aſſent.

Corporations, as colleges, hoſpitals, pariſhes, &c. being only civil perſons, cannot contract by themſelves; but they may do it by the intervention of their truſtees or other proper officers.

50. There are perſons who, being naturally capable of contracting, are incapacitated to contract by the municipal law. Such are, in the cuſtomary provinces, married women when they are not authoriſed by their huſbands or the court. For it is a conſequence of the marital power, that the wife be incapable of doing any thing except it be dependently on the huſband and by his authority. Hence it follows that, without his authority, ſhe is incapable of making any agreement, and that ſhe can neither bind herſelf to others, nor bind others to her. We have treated of this matter in the introduction to *tit.* 10. of the Cuſtom of Orleans, chap. 8.

It is alſo the municipal law alone which renders perſons interdicted, on account of their prodigality, incapable of binding themſelves by their contracts: for theſe perſons know what they are doing; the aſſent which they give is an actual aſſent, which is ſufficient to form a contract.

51. Hence arises the difference between persons interdicted for that cause and persons interdicted on account of lunacy. All contracts made with a lunatic, although before his interdiction, are void; if it can be proved that he was a lunatic at the time of the contract. For it is his lunacy which alone and of itself incapacitates him to contract, independently of the judgment of interdiction, which serves only to ascertain the lunacy. On the contrary, contracts made with a prodigal, before his interdiction, are valid, although he was a prodigal before; for it is the judgment of interdiction alone which disables him from contracting.

Nevertheless, if I had contracted with a prodigal, although before his interdiction, in buying a thing from him, or in lending him money, knowing that he sold or borrowed merely to employ immediately in his debaucheries the price of the thing sold or the money borrowed, the contract would be void in *foro conscientiæ*, and I could not keep the thing which he had sold me, nor require from him the sum which I had lent him. For in knowingly supplying him with money, to be wasted in debauchery, I have done him a wrong which binds me to him to repair it, in not requiring of him the sum which he received from me to spend in debauchery, and in restoring to him the thing which he sold me. This is conformable to what is declared in L. 8, ff. *pro emp.* that he ought not to be regarded as a purchaser, *bona fide*, who has purchased a thing from a libertine, knowing that he sold it merely to procure money to bestow on courtezans: *Nisi forte is qui a luxurioso, & protinus scorto daturo pecuniam, servos emit, non usucapiet.*

These decisions are good in *foro conscientiæ*; but in our courts a person of age and not interdicted, would not be allowed to attack his contract for a sale or loan, under the pretence that the person with whom he contracted, knew that he sold or borrowed for the purpose of procuring money to be spent in debauchery.

52. It is also the municipal law alone which invalidates the obligations which minors contract without the authority of their guardians, when at the time of the contract they

are nearly of age, and have a sufficient use of their reason to know the extent of the engagement which they contract. Therefore minors may well, even in a moral light, avail themselves of the benefit of the letters of rescission, which the law grants them, against the contracts in which they have been wronged: natural equity forbidding the person who contracted with them to avail himself of their want of experience. But they cannot honestly avail themselves of the benefit of these letters of rescission, which the municipal law grants them, to avoid restoring money which they have received and wasted, when, at the time they contracted, they had a sufficient use of their reason, provided the person they contracted with made the loan *bona fide*, without knowing that the money was to be wasted in foolish expences. *La Placette*, cited by Barbeyrac, in his notes on Puffendorf.

There remains for us to notice a difference between the incapacity of interdicted persons and minors, and that of *feme coverts*. The latter are absolutely incapable of contracting without being authorised so to do: and they can no more, without authority, bind others to them by their contracts, than bind themselves. They cannot even accept a gift which may be made to them: *Ord.* 1731, *art.* 9. On the contrary, prodigals and minors who begin to have the use of reason, are rather incapable of binding themselves by their contracts, than absolutely incapable to contract. They may, by contracting without the authority of their guardians, bind others to them, although they may not bind themselves to others: *Placuit meliorem conditionem licere eis facere etiam sine tutoris autoritate*; Instit. tit. de Autor. tut. *Is tut bonis interdictum est, stipulando sibi acquirit*; L. 6, ff. *de Verb. oblig.* The reason of this distinction is, that the authority of guardians is established in favor only of minors and interdicted persons. The assistance of guardians is required when these persons contract, for the interest of these persons alone, and in order to prevent their being imposed upon. Therefore it becomes superfluous whenever their condition is bettered. On the contrary, the power of the husband over the wife not being established in favor of the wife, but in favor of the

husband; the necessity, she is under, of requiring the authority of the husband in order to contract, not being established for her interest, but as a deference which she owes to her husband: she cannot contract in any manner, either to her advantage or to her disadvantage.

The ordinance of 1731 has in no way altered the principle which we have established, that a minor may better his condition without the authority of his guardian: and it is without reason that Furgole says, that according to the seventh article of that ordinance, minors cannot accept, without the authority of their guardians, the gifts which may be made to them. This article only provides that fathers and mothers, or other ascendants, without being guardians to their children, and consequently without being qualified to manage their affairs, may accept gifts made to their minor children, as validly as guardians may; natural affection supplying in this case the qualification which they have not. But from this ordinance allowing such persons to accept gifts made to their children, it does not follow that it prohibits minors to accept them themselves, when they have the use of their reason. *Introduction au Titre des Donations, de la Coutume d'Orleans, n.* 31.

Article V.

Of what may be the object of contracts. That it can only be something which concerns the parties, according to the rule that one can validly stipulate but for himself.

53. Contracts have for their object, either the things which one of the contracting parties stipulates shall be given to him, and which the other promises to give him; or something which one of the parties stipulates to be done or not to be done, and which the other party promises to do or not to do.

We shall see hereafter, when we come to treat of what may be the object of obligations, what are the things which one of the parties may stipulate to be given him, and which the other party may engage to give; and what are the things which one of the parties may stipulate to be done or not to

be done; *chap.* 2, *art.* 2. We refrain from speaking of this here, to avoid repetition.

We will content ourselves with developing here a principle relating to what may be the object of contracts. This principle is, that it is only what one of the contracting parties stipulates, and likewise that it is only what the other party promises, for himself, that may be the object of a contract: *Alteri stipulari nemo potest;* Inst. *de inut. Stipul.* §. 18. *Nec paciscendo, nec legem dicendo, nec stipulando, quisquam alteri cavere potest;* L. 73, §. fin. ff. *de R. J.* Versa vice, *Qui alium facturum promisit, videtur in ea esse causa ut non teneatur, nisi poenam ipse promiserit;* Inst. *d. tit.* §. 20. *Alius pro alio promittens daturum factumve, non obligatur; nam de se quemque promittere oportet;* L. 83, ff. *de Verb. oblig.*

To develop this principle, we shall see, in a previous paragraph, what are the reasons of it. In a second, we shall relate several cases in which we contract for ourselves although another person be mentioned in the agreement. In a third, we shall remark that what concerns a person not one of the contracting parties, may be the mode or condition of an agreement, although it may not be the object of it. In a fourth, we shall observe that one may contract by the intervention of a third person, and that this is not to stipulate or promise for another.

§. I.

What are the reasons of the principle that one cannot stipulate or promise for another.

54. If I stipulate something for you in favor of a third person, the agreement is void. For by this obligation you contract no obligation to that third person nor to me. It is obvious that you contract none to the third person. For it is a principle that agreements can have no effect except between the contracting parties: consequently they cannot acquire any right to a third person who is not a party. Neither do you contract any civil obligation to me: for what I stipulated for you in favor of a third person, being a thing in which I have not an interest that is appreciable in money; there can result no damages to me from the inexecution of

your promise. You may then disregard it with impunity. Nothing is more contrary to the civil obligation than the power of contravening it with impunity. This is the meaning of Ulpian when he says: *alteri stipulari nemo potest; inventæ sunt enim obligationes ad hoc, ut unusquisque sibi acquirat quod sua interest; cæterum ut alii detur nihil interest mea*; l. 38. §. 17, ff. *de Verb. obl.*

55. This first part of our principle, that it is only what a party stipulates for himself that may be the object of an agreement, is true only in a legal point of view and with regard to civil obligations. But in *foro conscientiæ*, if I have stipulated with you that you should give something to a third person, or that you should do something in his favor, the agreement is valid. Although the interest, which I take in it, is not appreciable in money, it is still an actual interest: *hominis enim interest, alterum hominem beneficio affici*: and this interest of mere affection for this third person, gives me a sufficient right to require from you in *foro conscientiæ* the performance of your promise in his favor, and to render you guilty if you fail to perform it, when you have it in your power to do so and this third person is willing to accept what you promised to give him. It is true that my interest not being appreciable in money, and being incapable of being the object of an agreement, I shall not be able to recover damages in the municipal tribunals, if you fail in your promise. Yet the liberty in which you are of failing to do it thus with impunity, is an obstacle to the civil obligation, but does not affect the moral obligation. *Grotius*, *l.* 2, *c.* 11, *n.* 18.

Note that the moral obligation which results from this agreement, by which I have stipulated that you should give something to a third person, is an obligation which is contracted to me and not to this third person, when it is in my name and not in that of this third person that I agreed with you. Therefore I may release you from it, without the consent of this third person. *Grotius*, *ibid.* *Puffendorf.*

But if it was in the name of this third person and as acting under his authority, that I stipulated with you that

you should give him or do for him such thing, it would be this third person who had contracted for you by my intervention, and not I. *Infra*, §. 4.

56. The second part of this principle, that one may promise for himself alone, is obvious. For when I promised that another should give you something or should do something, without pretending to have any authority from him, and without promising any thing for myself, this agreement can neither bind this third person nor me. It cannot bind the third person: for it is not in my power to bind a third person without his assent. Neither does it bind me: for since it is supposed that I promised for another person and not for myself, I intended not to bind myself.

But courts will easily presume that he who promised that a third person should give or do something, did not mean *pure de alio promittere*, but that he meant to promise *de se*, i. e. that he would procure it to be done by that person, although this be not expressed. In such case, the agreement is valid and binds the person who made the promise to pay the damages resulting from the inexecution of what he promised; L. 81, ff. *de Verb. oblig.*

When in promising the act of another, you submit to pay a certain penalty or merely damages, in case of the inexecution of the promise, it is not to be doubted that in this case you did not understand to promise merely the act of another, *& de alio tantum promittere*, but that you understood to promise that you would procure him to do or give the thing, *& de te promittere*. Therefore Ulpian says: *Si quis velit alienum factum promittere, poenam vel quanti ea res est, potest promittere.* L. 38, §. 2, ff. *d. t.*

§. II.

Cases in which we actually stipulate or promise for ourselves, although another person be mentioned in the agreement.

First Case.

57. It is not to stipulate for another to say, that the thing or sum which I stipulate shall be paid to a third person designated by the agreement. For example. If by the contract I sell you an estate for the sum of 1000 livres, which

you shall pay to Peter, I do not ſtipulate for another: it is for myſelf and not for Peter that I ſtipulate this ſum of 1000 livres. Peter, in this agreement, is only as a perſon to whom I give power to receive the money for me and in my name. This is what the Romans called *adjectus ſolutionis gratia*, of which we ſhall treat hereafter, *infra*, *Part* 3, *Chap.* 1, *Art.* 2, §. 4.

It is not in his perſon, but in mine, that the right to this ſum reſides. When he receives it, it is in my behalf and in my name that he receives it, and his receiving it conſtitutes between him and me a contract of mandate, if my intention was that he ſhould account for it; or a gift, if my intention was to beſtow it upon him.

Second Case.

58. I do not ſtipulate for a third perſon, but for myſelf, when I ſtipulate that a thing ſhall be done for a third perſon, if I have a perſonal intereſt, appreciable in money, that it be done. *Puta*, if I be myſelf bound to this third perſon to have it done. For example. If, having bound myſelf to James to rebuild, within a certain time, his houſe which is near falling, and having other work to attend to, I bargain with a maſon for his rebuilding the houſe of James within this time; I am preſumed to ſtipulate rather for myſelf than for James, and the agreement is valid. For being bound to James to rebuild the houſe, and being liable to pay damages if the houſe be not built within the time given, I have an actual perſonal intereſt in its being rebuilt. Therefore in ſtipulating for the rebuilding of the houſe of James, it is only *verbo tenus*, in this caſe, that I ſtipulate for James; *re ipsa* and in reality I ſtipulate for myſelf and for my benefit. *Si stipuler alii cum mea interesset.... ait Marcellus stipulationem valere*; L. 38, §. 20, 21, 22, ff. *de Verb. oblig.*

59. Even if, before the bargain which I made with the maſon, for rebuilding the houſe of James, I ſhould not have been bound to James for the rebuilding of his houſe, and I ſhould conſequently have had no perſonal intereſt in the rebuilding of it; yet, as by this bargain which I have made, I manage the affairs of James, and therefore become liable to James

for the management of them; at the very time of the agreement which I make with the mason for the construction of the house, I begin to have an interest in the rebuilding of the house, for which I am accountable to James: whence it follows that even in this case I am presumed to stipulate for myself rather than for James, and the agreement is valid, since I have a personal interest in the mason's doing what I stipulated he should do.

60. But if I stipulate in my name that a thing be done for a third person, without having had, before the agreement, and without having, at the time of the agreement, any personal interest in its being done; in this case it is really to stipulate for another: and such an agreement is not valid in law. For example. If from a motive of mere affection, I make an agreement with the owner of the house which is opposite the windows of James, that he shall whiten the front of his house, that the rooms of James may be the lighter thereby; this agreement will give no right to James, who was not a party to it, nor to me, who, having no personal interest, appreciable in money, in the execution of this agreement, can claim no damages for its inexecution.

THIRD CASE.

61. It is to stipulate or promise for ourselves and not for others, when we stipulate or promise for our heirs, since they are in a manner a continuation of ourselves. *Hæres personam defuncti sustinet.* Therefore it is not to be doubted that we may stipulate for our heirs: *Hæredi tavere concessum est;* L. 10, ff. *de Pact. dot.* L. 38, §. 14, ff. *de Verb. oblig.*

62. Observe that we validly stipulate, when we stipulate for our heirs, in their capacity of heirs: but if one stipulate for A, although he afterwards should become his heir, the stipulation is not therefore valid. *L.* 17, §. 4, ff. *de Pact.*

Julian has carried the strictness of this principle so far as to say, that when a debtor had agreed with his creditor that he should not require the debt from him, nor from A his daughter, the stipulation is not valid with regard to the daughter, although she since became heir to the debtor; *d.* §. 4. Bruneman is of opinion, and with reason, that this

too literal decision is not to be followed; for if I stipulate with my creditor that he shall not require from me, nor from my daughter, the sum which I owe him, it is obvious that I stipulate for my daughter, in case she becomes debtor of it, which she cannot be unless she becomes my heir. I then stipulate this for the case in which she may become my heir; and consequently I am presumed to stipulate for my daughter, in her future capacity of my heir, although this be not expressed, *ad. d. L.*

It is safer to recede from the opinion of Julian, for it appears that the Roman lawyers were not unanimous in this question: Celsus thought differently in *L.* 33, ff. *de Pact.*

63. We may not only validly stipulate for our heirs, but we are commonly presumed to have done so, although this be not expressed. *Qui paciscitur, sibi hæredique suo pacisci intelligitur.*

This rule admits of a few exceptions. I. When what is the object of the agreement, is a fact personal to him to whom the obligation is contracted; as when I agree with a barber that he shall come and shave me twice a week at my villa, during the vacations. II. With regard to the clause in marriage settlements, by which the wife stipulates that she shall resume what she brings, in case she renounces the community. We have amply spoken of this clause in our introduction *au titre de la Communauté, de la Coutume d'Orléans, ch.* 2, *art.* 2, §. 5. III. When it is clearly expressed in the agreement, that the person who contracted bound himself to the person with whom he contracted and not to his heirs. But this must be clearly expressed in the agreement. From the naming, in the agreement, the person with whom I contract an engagement, it does not follow that the intention of the parties was to restrain to his person the right resulting from it: *Plerumque persona pacto inseritur, non ut personale pactum fiat, sed ut demonstretur cum quo pactum fiat;* L. 7, §. 8. Wissenbach, ad tit. ff. *de Pact. n.* 7.

64. We may also restrain our stipulation to one of our heirs: *Non obstat uni tantum ex hæredibus provideri, si hæres*

factus sit, cæteris autem non consuli; L. 33, ff. *de Pact.* For example. If I agreed with my creditor that he ſhould not require his debt from me nor from my daughter, and I ſhould leave my ſon and my daughter my heirs, the agreement will have effect only with regard to the daughter, ſhe alone being mentioned in it; and the creditor will have a right to require the debt from my ſon for the part for which he is my heir; *d. L.* 33. It is improperly that the gloſs ſays the creditor may require the whole from him. Cujas has taken notice of this miſtake.

But from a perſon's having ſtipulated by name for A, his heir, it is not always to be inferred that the intention of the parties was to reſtrain the ſtipulation to this heir. There is room to infer it, if, at the time of the agreement, he who thus ſtipulated knew that he was to have other heirs. For then no reaſon appears which might have induced him to ſtipulate for him by name, but in order to reſtrain the ſtipulation to him. On the contrary, if he who has ſtipulated for a particular perſon his heir, had, at the time of the agreement, room to believe that he would be his only heir, it is to be preſumed that his being named in the agreement is merely enunciative and not with the view to reſtrain the effect of the ſtipulation to his perſon. Papinian ſhews this in the following example.

Having married my daughter, with a portion of which I paid the intereſt, and imagining I ſhould have no iſſue but this daughter, who was already provided for, and intending to inſtitute my brother my ſole heir, I ſtipulated in her marriage ſettlement, that in caſe ſhe ſhould die without iſſue, (on which contingency her portion was, by the Digeſt, acquired by the huſband) my brother, my heir, might retain one half of the portion; afterwards I had other children, and my daughter dying without iſſue before her huſband, the queſtion ariſes whether my children, as my heirs, will be entitled to retain, under the agreement, one half of the portion. The reaſon to doubt reſults from the ſtipulation being made in the name of my brother: whence it may appear to be reſtricted to him and to the caſe in which he might have been my heir. But Papinian holds that my

children are well grounded in claiming the one half of the portion: becauſe in ſtipulating for the right of retaining it for the benefit of my brother, my heir, I am to be preſumed to have ſtipulated it, by uſing the words "my heir" for the benefit of my heirs, whoever they may be, and to have named my brother only as *enunciative*, and to ſhew that it was he who I expected was to be my heir. *Ea conventio liberis postea susceptis & hæredibus testamento relictis proderit, cum inter contrahentes id actum sit, ut hæredibus consulatur, & illo tempore quo pater alios filios non habuit, in fratrem suum judicium supremum contulisse videatur;* L. 40, §. fin. ff. *de Pact.* Therefore Cujas, *ad Papinian.* on this law, thinks it would have been ſo, whoever might have been my heir, even if they had not been my children.

There remains to be obſerved, that when I ſtipulate with my creditor that he ſhall not require what I owe him, the agreement may be reſtrained to one of my heirs, in order that he alone may be diſcharged from the debt, for the part for which he would have been liable. But when I ſtipulate that a ſum of money or any other diviſible thing, ſhall be given to me, I cannot confine the agreement to one of my heirs, ſo as to cauſe the whole right which reſults from the agreement, to paſs to him alone. *Sciendum est quod dari stipulemur, non posse per nos uni ex hæredibus adquiri, sed necesse est omnibus adquiri;* L. 137, §. fin. ff. *de V. obligat.* What is ſaid here, *sed necesse omnibus adquiri*, muſt be underſtood of the caſe in which the reſtriction to one of the heirs is only made with the view to transfer to this heir, in excluſion of the others, the whole claim. But I may validly agree that if I have not required the debt before my death, my debtor ſhall only be liable for it to the amount of the part to which one of my heirs will ſucceed to me, and that he ſhall be diſcharged as to the reſt.

65. This is a conſequence of the principle that one can validly ſtipulate for another, inaſmuch only as he is to be his heir and in the quality of heir, which he is one day to have. Hence it follows that he cannot ſucceed for the whole, in the rights which reſult from this agreement; but only for the part for which he ſhall be heir.

It is otherwise with regard to agreements which have for their object something indivisible: such are most of those *in faciendo*. For as in those each of the heirs succeed for the whole to the right which results from them, it being of the nature of that right not to be susceptible of parts; I can, in stipulating by name for A, one of my heirs, cause him to succeed to the whole right which results from the agreement. *At cum quid fieri stipulamur, unius personam recte comprehendi;* d. L. 137, §. 8. For example. If in the sale of an estate to a painter, there be a clause by which it is stipulated that he shall make for me or for A, one of my children and heirs, a painting of the circumcision of our Saviour, of a certain size, and I die before it is done; A, who is named in the agreement, will alone succeed for the whole to the claim against the painter. But in the provinces, the customs of which do not allow a father to prefer one of his children to the others in the disposition of his estate, he would be bound to compensate his co-heirs for their parts.

66. As we are presumed to stipulate for our heirs whatever we stipulate for ourselves, so we are presumed to promise for our heirs and bind them to every thing we promise: unless what is the object of the stipulation be something personal; or there be a clause to the contrary.

Likewise in divisible obligations as one cannot stipulate for another, but inasmuch as he will be his heir and for the part for which he will be his heir, so he cannot bind any of his heirs for more than the part for which he shall be his heir. Therefore a debtor would in vain include, in the agreement, a person who is to be his heir; for he will be bound no farther than the other heirs, who are not named. *Te & Titium hæredem tuum decem daturum spondes? Titii persona supervacue comprehensa est: sive enim solus hæres extiterit, in solidum tenebitur; sive pro parte, eodem modo quo cæteri cohæredes ejus;* L. 56, §. 1. ff. *de Verb. oblig.*

Fourth Case.

67. What we stipulate with regard to a thing which belongs to us, may validly be stipulated not only for ourselves and our heirs, but those who shall succeed to us in the own-

ship of it, who are comprehended in the expression assigns, commonly used in contracts. It is not in this case a stipulation for another. For example, I may validly stipulate that you shall never exercise against me nor against my heirs or assigns, the claim which you may have on a certain estate, by the happening of a condition; and this stipulation will have effect in favour of those who may afterwards acquire the estate from me.

* This is so not only with regard to those who might acquire it by purchase: for being bound to warrant the sale, I have an interest that you should not disturb them; this suffices in order that I should be held to have stipulated for myself what I stipulated for them: but it would be so likewise with regard to those who might acquire it by gift. L. 17. § 5. ff. de Pact. though I am not bound to warrant their title: for the interest which I have in preserving the free disposition of the thing is sufficient for me validly to stipulate with you that you shall not disturb those to whom I may see fit to dispose of it on any terms whatever.

68. In this agreement, and others like it, which we make relatively to the things which belong to us, not only may we validly stipulate for our assigns, but we are presumed to have done so, although this be not expressed, whether the agreement be in rem, as when it is said in the contract that you engage not to exercise the right which you may have on such an estate, without saying against whom; or whether it be in personam, as when it is said that you engage not to exercise against me your rights on such an estate. In both cases I am presumed to have stipulated for all those who shall succeed me in the ownership of the estate, even by gift. *Pactum conventum cum venditore factum, si in rem constituatur, secundum Proculi sententiam, et emptori prodest* [illegible] *Sabini* [illegible] *etiam si in personam conceptum est, et emptori prodest;* [illegible] *per donationem successori* [illegible] *factum sit;* L. 17, § 5. ff. de Pact. The reason is that in stipulating for myself, I am presumed to stipulate for all those who shall represent me: and not only my heirs, but all those who succeed to me, mediately or immediately, in

any manner whatever, in the ownerſhip of the eſtate which was the object of the agreement, repreſent me with regard to this eſtate.

69. If I had ſtipulated *for my heirs*, by name, I would not be preſumed to have extended my ſtipulations to my aſſigns. In this caſe *expressio unius est exclusio alterius*. The expreſſion *my heirs*, excludes my other ſucceſſors. For example. If in an agreement with the lord of the manor of whom my eſtate is holden, I have agreed with him, that whenever he ſhould be entitled to relief out of it, he ſhould not demand more from my heirs than a piſtole for this his right. This agreement will not avail a third perſon who may acquire the eſtate from me or my heirs, by ſale, exchange, gift, &c. It would be otherwiſe if my heirs had not been mentioned in the agreement, and it had been ſaid indefinitely that whenever relief ſhould be due, the lord ſhould not require more than a piſtole; or after the word heirs there had been added an &c. In either caſe the clauſe would extend to the aſſigns.

§. III.

That what concerns a person not one of the parties, may be the mode or condition of an agreement, although it may not be the object of it.

70. To give to a third perſon, to do ſomething for a third perſon, and generally what concerns not the perſonal intereſt of the perſon who ſtipulates, cannot indeed be the object of a contract, but may be *in conditione aut in modo*.

Thus I cannot indeed validly ſtipulate in my name that you ſhall make a preſent to James of the Theſaurus of Meerman; but I may validly ſtipulate that if within a given time you do not make a preſent to James of the Theſaurus of Meerman, you ſhall pay me ten piſtoles above the price for which I ſell you an eſtate. For in this caſe the preſent which you are to make to James is only a condition. The object of the ſtipulation is that you ſhall pay me the ſum of ten piſtoles, and this ſum is a thing which I ſtipulate for myſelf and which I have an intereſt to have. *Alteri stipulari nemo potest.... Plane si quis velit hoc facere, poenam stipulari*

conveniet, ut, nisi ita factum sit ut est comprehensum, committatur poenæ stipulatio etiam ei cujus nihil interesi. Just. *tit. de inut. stipul.* §. 20.

71. What concerns the interest of a third person may also be *in modo*; i. e. that although I cannot directly stipulate what concerns the interest of a third person, yet I may alien what belongs to me, with a stipulation that the person to whom I alien it, shall do a thing which concerns the interest of a third person. For example. Although I cannot validly stipulate in my name that you shall make a present of the Thesaurus of Meerman to James, I may validly give you a sum of money or other thing, stipulating that you shall make this present to James.

According to the principles of the old Roman law, the effect of this condition was, that, on your failing to perform the stipulation under which you had received the money or other thing from me, I had a right to claim back what I had given you. For as I gave, and you received it only under this stipulation, there has arisen between us an implied agreement, that you should restore the thing to me, if you did not fulfil the stipulation under which I gave it. Hence results the right of claiming the thing by an action which the law calls *condictio (sex repetitio) ob causam dati, causa non secuta.*

But, according to these principles, the third person who had not been a party to the contract by which I gave you something, under a charge that you should give him something, had no action to recover it, and this is grounded on the principle that contracts have no effect, except between the contracting parties. Hence it follows that no right can accrue to the third person, who was no party to the contract. But according to the constitutions of the Emperors, a third person in whose favor a donor adds a charge to the gift, has an action to compel the donee to fulfil the intention of the donor. *L.* 3, *Cod. de Donat. quæ sub mod.*

72. This engagement, which the donee contracts with this third person, according to the charge of the donor, under which the gift was made, and from which this action

reſults, is an engagement which is not indeed properly formed by the contract of gift, as this contract cannot of itſelf and *propria virtute* produce an engagement to a third perſon, and give a right to a third perſon who was not a party to it. It is natural equity which forms this engagement; becauſe the donee cannot, without acting contrary to equity and without incurring the guilt of perfidy, retain the thing which was given him, if he does not perform what was required by the charge under which the gift was made and to which he ſubmitted, in accepting the gift. Therefore the action which is given to this third perſon, is called by the law *actio utilis*, ibid. which is the name the Roman lawyers gave to actions which had no other foundation than equity; *quæ contra subtilitatem juris, utilitate ita exigente, ex ſola æquitate concedebantur.*

73. Hence ariſes another queſtion, i. e. whether, having given you a thing, under a charge to reſtore it to a third perſon, within a certain time, or to give him ſomething elſe, I may releaſe you from your obligation without the intervention of this third perſon, who was no party to the contract and who has not accepted the liberality which I intended to exerciſe towards him, by impoſing this charge on you? Authors have been divided on this queſtion. Grotius, *de Jure belli & pacis*, II, IX, 19, maintains the affirmative, which is alſo the opinion of Bartolus, Duaren and ſeveral other writers, particularly Ricard, *Traite des Subſtitutions, part.* 1, *ch.* 4. The reaſon on which they eſtabliſh it is that this third perſon not having intervened in the gift, the engagement which the donor contracts to give ſomething to the donee, in accepting the gift under that charge, is contracted by the concurrence of the will of the donor and the donee, and conſequently may be diſſolved by the contrary will of the ſame perſons, according to the principle, *nihil tam naturale eſt quæque eodem modo diſſolvi quo colligata ſunt.* The right which is acquired by this third perſon is then, according to theſe writers, a right which is not irrevocable; becauſe being formed by the ſole will of the donor and donee, without the intervention of this third perſon, it is liable to be deſtroyed by the deſtruction of their aſſent, a

ſince my death, but before it might be known in the place where the contract was made, the contract will bind my eſtate, as if I had effectually contracted by his intervention.

The laſt poſition and that which precedes it, are ſupported by the principle of law; L. 12, §. 2, & L. 32, ff. *de Solut.* that a payment made to an attorney is valid, although made ſince the death of the principal or the revocation of the power, if the death or revocation was not known.

82. We contract by the interpoſition of another, not only when one merely lends us his aſſiſtance, in contracting in our name and not in his own, but when we contract by the intervention of guardians, attornies &c. who contract in ſuch their capacities of guardians, attornies &c. and not in their own names. We are alſo preſumed to contract by the interpoſition of another, although he contracts in his own name, when he contracts in regard to affairs which we have committed to his care. For in committing our affairs to him, we are preſumed to have adopted and approved beforehand all the contracts he may make relative to the affairs which we have committed to him, as if we had made them ourſelves; and we are preſumed to have acceded to all the obligations reſulting from them.

It is on this principle that is grounded the action *exercitaria*, which thoſe who have contracted with the maſter of a veſſel in regard to the affairs of the veſſel, have againſt the owner who appointed the maſter.

It is likewiſe on the ſame principles that is grounded the action *institoria*, which thoſe who have contracted with the manager of a particular branch of trade or a manufacture, in regard to the affairs relative thereto, have againſt thoſe who employ him: and the action *utilis institoria* reſpecting contracts made with a perſon to whom any other kind of buſineſs is committed.

We ſhall treat of theſe actions hereafter, *Part.* 2, *Chap.* 6, *Sect.* 8.

Note a difference between all theſe perſons and guardians, attornies, truſtees, &c. when the former contract, it is they who contract and bind themſelves. Their employers

are only presumed to accede to their contracts and the obligations that thence result. While the latter are not presumed to contract, themselves, but only to lend their assistance in the contract to those, who are under their guardianship, whose power they have, or the corporations whose officers they are. Therefore they do not bind themselves, but those who contract by their interposition.

83. We are also presumed to contract by the intervention of our partners, when they contract, or are presumed to contract, in regard to the affairs of the partnership. For in entering into partnership with them and allowing them to manage the affairs of the partnership, we are presumed to have adopted and approved, before hand, all the contracts they might make in regard to the affairs of the partnership, as if we had ourselves contracted jointly with them: and we have beforehand acceded to all the obligations resulting therefrom.

Note that a partner is presumed to have contracted for the affairs of the partnership, whenever he adds to his signature the words, *and company*, although the contract did not afterwards turn to the advantage of the partnership. For example. If he has borrowed a sum of money from a person to whom he has given a note with these words, *and company*, at the end of his signature; although he afterwards applied this money to his own private affairs or lost it at play, he shall not be the less presumed to have contracted for the affairs of the partnership, and consequently to have bound his partners, who are reputed to have borrowed the money jointly with him, and to have contracted by his intervention. These partners ought to impute it to themselves to have entered into partnership with a dishonest person; but those who dealt with him ought not to be deceived nor suffer from his infidelity.

The signature *and company* would not nevertheless bind my partners, if it appeared from the nature of the contract, that it does not relate to the affairs of the partnership; as if I put this signature to the lease of an estate which belongs to me individually, and which I had not put into the partnership stock.

When the partner has not ſubſcribed *and company*, he is preſumed to have contracted in regard to his private affairs, and he does not bind his partners, unleſs the creditor proves, by ſome other means, that he contracted in the name of the partnerſhip, and that the contract actually concerned the affairs of the partnerſhip.

84. A wife, in a community of goods with her huſband, is alſo preſumed to have contracted with him and by his interpoſition, in all the contracts which the huſband makes during the community, and to accede to all the obligations which reſult from them, for the part which ſhe has in the community, with this condition nevertheleſs, that ſhe is bound only to the amount of the profits ſhe may make during the community.

Article VI.

Of the effect of contracts.

85. Contracts produce obligations. We refer, as to what concerns the effect of theſe obligations, to what will be ſaid hereafter, *Chap.* 2, in treating generally of the effect of obligations. We ſhall take notice now of a principle which is peculiar to the effect of contracts and of all agreements.

This principle is, that an agreement has no effect but with regard to things that are the object of the agreement, and only between the parties. *Animadvertendum est ne conventio in alia re facta aut cum alia persona, in alia re, aliave persona noceat;* L. 27, §. 4, ff. *de Pact.*

86. The reaſon of the firſt part of this principle is obvious. The agreement being formed by the will of the parties, it can only have effect on what the contracting parties intended and had in view.

We may give as an example of the firſt part of this principle, the ſtipulations of proper goods. When bringing a certain ſum into the community, I have ſtipulated in my marriage ſettlement that the ſurplus of my property ſhould remain my own private property, this agreement ought not to have the effect of excluding from the community, the private property that may come to me by will or inteſtacy;

during the marriage. For it has no object but to exclude from the community the overplus of the goods which I had at the time of the marriage. See other examples *in l.* 27, §. 7; *l.* 47, §. 1; *l.* 56, ff. *de Pactis*, & *passim*.

87. The second part of the principle is not so obvious. The obligations, which arise from agreements and the rights that result from them, being formed by the assent and concurrence of the will of the parties, it cannot bind a third person, nor give a right to a third person whose will has not concurred in forming the agreement.

The following example from the law 25, *Cod. de Pactis*, will illustrate this. If I have agreed with my co-heir that he should take on himself, alone, a certain debt of the estate; this agreement will not prevent the creditor of the debt from requiring of me the part for which I am heir. For this agreement can have no effect with regard to the creditor who was no party to it. *Debitorum pactionibus, creditorum petitio nec tolli, nec minui potest*; d. L. Number of other examples might be adduced. It is not a thing contrary to this principle, that a partner, in contracting, binds his partners, an agent his employer, an husband his wife. For as we have seen in the preceding article, those persons are presumed to have been parties, themselves, through the intervention of the partner, agent or husband.

88. It would seem that what is observed with regard to contracts of compositions, in case of insolvency, might be offered against this principle with more reason. When a debtor, who pretends to be unable to pay his debts, makes an agreement with three-fourths of his creditors (which is reckoned, *non pro numero personarum, sed pro cumulo debiti*); this agreement, which contains a time of payment and a discharge of part of the debt, may be opposed to the other creditors, although they be not parties to the contract: and the debtor may, by citing them, have the agreement declared common with them: so that it prejudices not their rights of hypothecation, if they have any. See the ordinance of 1673, *tit. XI, art.* 5, 6, 7, 8; & L. 7, § 19; L. 8, L. 9, L. 10, ff. *de Pact.* This is not properly an exception to our princi-

to take the corn away, in behalf of the leſſor; this ſenſe being moſt favorable to the leſſee, who contracted the obligation. If the leſſor intended to have the corn delivered at his barn, he ought to have expreſſed it.

Eighth Rule.

98. However general may be the words in which an agreement is expreſſed, it comprehends thoſe things only on which it appears the parties intended to contract, and not thoſe which they had not in view. *Iniquum est perimi pacto, id de quo cogitatum non est;* L. 9, §. fin. ff. *de Trans.*

According to this rule, if we have ſettled all our reſpective pretenſions and agreed upon a certain ſum, which you promiſed to pay me, by means of which we hold each other quit from all claims whatever: this ſettlement will not prejudice other claims which I might have upon you and of which I had no knowledge. *His tantum transactio obest de quibus actum probatur: non porrigitur ad ea quorum actiones competere postea compertum est;* d. L. 9, §. fin.

For example. If a legatee has compounded, for a certain ſum, his rights reſulting from the eſtate of the deceaſed, he will not be precluded from demanding a legacy left to him in a codicil, which was not diſcovered till ſome time after; L. 3, §. 1; L. 12, ff. *de Trans.*

Ninth Rule.

99. When the object of the agreement is an univerſality of things, it comprehends all the particular things which compoſe this univerſality, even thoſe of which the parties had no knowledge.

One may give as an example of this caſe, the agreement by which I abandon to you, for a certain ſum, my part in the eſtate of a deceaſed perſon. This agreement comprehends all the things which make part of the eſtate, whether we have any knowledge of them or not; our intention having been to treat of all the things which compoſe it. Wherefore it is held that I cannot be permitted to attack the agreement under pretence that, ſince it took place, a number of things have been diſcovered to belong to the eſtate, of which

I had no knowledge: *Sub prætextu specierum post repertarum, generali transactione finita rescindi prohibent jura;* L. 29, Cod. *de Trans.*

Provided, however, that theſe things were not concealed by my co-heir, with whom I have treated for my part of the eſtate, and who had thoſe things in his poſſeſſion. For otherwiſe there is on his part a fraud which authoriſes me to attack the agreement: *Error circa proprietatem rei apud alium* EXTRA PERSONAS TRANSIGENTIUM, *tempore transactionis conſtitutæ, nihil potest nocere.*

Our principle is grounded on the preſumption that the parties who treat of an univerſality of things, have an intention to treat of all the things which compoſe it, whether they have knowledge of them or not. It is liable to an exception however, when it appears that they intended to treat of the things contained in this univerſality, which were known to them, as when they treated on an inventory. *Puta*, if by an inſtrument between my co-heir and myſelf, it is ſaid that I cede to him, for a certain ſum, my part of the perſonal property of an eſtate, *contained in the inventory*, or *according to the inventory*. It is clear that in this caſe our intention has only been to treat of what is contained in the inventory, and not of what has been omitted and which was not known to us.

Tenth Rule.

When in a contract a caſe has been mentioned, on account of the doubt there may have been, whether the engagement reſulting from the contract, would otherwiſe extend to it, the parties are not preſumed to have intended to reſtrain the legal extent of the engagement with regard to other caſes which are not expreſſed.

Quæ dubitationis tollendæ causa, contractibus inseruntur, jus commune non lædunt; L. 81, ff. *de Regulis juris;* L. 56, *Mand.*

For example. If in a marriage ſettlement it is ſaid that there ſhall be a community of goods between the huſband and wife, in which community ſhall enter the perſonal pro

perty which either party may acquire. This clauſe will not prevent all other things, which legally fall into the community, from entering into it; becauſe it is only inſerted in order to clear the doubt, which the parties, not very converſant in legal matters, might entertain whether ſuch perſonal property enters into the community of goods.

ELEVENTH RULE.

101. In contracts, as well as in teſtaments, a clauſe inſerted in the plural number often divides itſelf into ſeveral ſingular things.

For example. If in a deed of gift to James and Richard, my ſervants, of a certain eſtate, it be ſaid, "provided that after *their* death, without iſſue, it ſhall revert "to the donor or his heir;" this clauſe in the plural number divides itſelf into two ſingular clauſes: "provided that "after the death of James without iſſue, his part ſhall revert "*to* the donor and his heirs, &c."; and likewiſe "provided "that after the death of Richard, without iſſue, his part ſhall "revert, &c." Arg. L. 78, §. 7, ff, *ad ſc. Trebel.*

TWELFTH RULE.

102. What is at the end of a phraſe relates commonly to the whole phraſe and not to what immediately precedes it. Provided what is thus at the end of a phraſe agrees in in gender and number with the whole phraſe.

For example. If in a contract of the ſale of a farm, it be ſold with all the grain, fruit and wines which *were* made on it this year: theſe words *which were made on it this year*, relate to the whole phraſe and not to the wines only, and therefore the old grain is as well excepted from the ſale as the old wine. It would have been otherwiſe, if it had been ſaid, and the *wine which has been made on it this year*. Theſe words *which has been made on it this year*, being in the ſingular, would relate to the wine only and not to the reſt of the phraſe. See *Paud. Juſtin. tit. de Leg. n.* 189 & 190.

ARTICLE VIII.

Of the oath which the contracting parties sometimes add to their contracts.

103. The contracting parties sometimes make use of an oath, the better to insure the future performance of the engagements which they contract.

The oath of which we speak here is a religious act, by which a person declares that he submits to the vengeance of God, or renounces his mercy, if he does not perform what he promises. Such is the result of these formulas: *So help me God. May God punish me, if I fail in my word*, &c.

104. The pretensions of churchmen had heretofore rendered common the use of oaths in all contracts. They pretended that all contestations, on the execution of contracts which were confirmed by an oath, belonged to the ecclesiastical judge. Because an oath was a religious act, and the refusal to perform an obligation, confirmed by an oath, being the violation of an oath, religion was interested in contestations respecting the execution of such engagements, which ought to render them cognizable by the ecclesiastical judge.

Therefore the notaries, who were churchmen, did not fail to insert, in all the contracts which they received, that the parties had made oath not to contravene any clause of the contract and to execute it faithfully, in order to insure to the ecclesiastical judge the cognizance of the execution of the contract. This style is often seen in several ancient manuscripts.

Churchmen have long ago been compelled to abandon these pretensions, to which ignorance had given rise: and the use of oaths has ceased in the contracts of individuals. Nevertheless, as it sometimes happens that persons resort to an oath, in order to insure the future performance of their promises, it will not be improper, summarily, to inquire what may be the effect of such an oath.

105. This oath has little or no effect in courts of justice. For either the obligation is deemed by them valid, of itself, or it is not. When it is deemed valid, of itself, the

oath is superfluous. For without its intervention, the creditor, to whom the obligation is contracted, has an action against the debtor to require the performance of it. The oath adds nothing to this action, and gives to the creditor no right which he had not before it intervened.

When the obligation is, of itself, invalid in those tribunals, and is one of those for which the municipal law has thought proper to deny an action, the oath is likewise of no effect in those tribunals. For the municipal law does not the less, on account of this, deny an action to the creditor.

For example. A tavern-keeper is no less inadmissible to claim, by suit, from an inhabitant of the place, payment for what the latter had eaten or drunk in his tavern; a gamester is no less inadmissible to sue for a gaming debt; because, in each case, the debtor had bound himself by an oath to pay. The reason is, that the oath being an accessory to the engagement, the law which deems the engagement void, ought, by a necessary consequence, to deem the oath void: *Quum principalis causa non consistit, ne ea quidem quæ sequuntur locum habent;* L. 129, §. 1, ff. *de Reg. jur.*

Add that it ought not to depend on individuals, by the interposition of an oath, to render any engagement valid which the municipal law has thought proper to reprobate. This would be to elude the law.

106. According to the Roman law, the oath, which one of the parties took, to perform his agreement, was indeed of no effect, when the object of it was something unlawful in itself; L. 7, §. 16, *de Pact.*; or when violence had been used; *Auth. Sacramenta*, Cod. *Si adv. vend.* But when the agreement had no other defect than the minority of one of the contracting parties, the oath which the party who had executed the agreement had taken not to attack it, had the effect to prevent his being admitted to do so. Such was the decision of Alexander Severus, in the case of the sale of an estate by a minor, who had promised to the buyer, by an oath, not to attack it: *nec perfidiæ, nec perjurii, me autorem tibi futurum sperare debuisti.* L. 1, Cod. *Si adv. vend.*

Automne informs us that this decision is not followed in

our jurisprudence. The reason is that if it were, the laws in favor of minors would be always eluded: it being easy for those who contract with them, to require them to bind themselves by an oath. The custom of Brittany, *art.* 471, formally decides that the contracts of infants are not rendered valid by their oaths.

It is principally in a moral view, that the oath by which one binds himself to perform his promise, may have some effect. It has the effect of strengthening the obligation and rendering the breach of the promise more criminal. For he who, having bound himself, by an oath, voluntarily fails in his engagement, adds to the infidelity which results from the voluntary breach of his promise, the guilt of perjury.

107. The oath has this effect, when the engagement is of itself valid, at least on the conscience. But supposing the engagement to be null, is the oath to fulfil it of no effect? We shall examine this question in a summary review of the defects which may render the engagement void.

When the engagement is void on account of its object, as when one has bound himself to give a thing which is not a subject of commerce, or to do an impossible thing, it is evident that the oath added to the engagement is not obligatory and has no effect.

All concede also that the oath to perform an unlawful engagement is not obligatory; that it is a crime to take such an oath and would be a greater to keep it; *scelus est fides.*

This position is correct, whether the thing be unlawful by the natural or by municipal law. For we are bound in conscience to obey the municipal law and the oath cannot lessen our obligation.

When the agreement is defective on account of error, (of which we have spoken before) so as to be void, the oath which accompanies it is also void. For the agreement being absolutely void, there results from it no obligation to which the oath may attach.

108. There is more difficulty when the defect proceeds from violence. Grotius contends that a promise extorted

by violence does not bind the person who made it; because if it were true that there results from it an obligation vesting a right in the person to whom it was made, he would himself be bound to indemnify the former, for the injury occasioned by such unlawful violence, by releasing him from his obligation. But when the promise, so extorted, has been confirmed by an oath extorted also by violence, Grotius contends that I am still bound in conscience to perform my promise; because if, for the above reason, I be not thus bound towards the person to whom I made the promise, still I am bound towards God, to whom I am presumed to have promised, by the oath which I have taken. Therefore if I do not perform my promise, having it in my power so to do, I am guilty of perjury; *Grotius, lib.* 2, *chap.* 13, *n.* 14.

The same writer observes that the heir of the person who has taken this oath, is not bound by the obligation resulting from it. Because my heir, who succeeds to me in my civil capacity, and represents me as a member of society, succeeds indeed to the obligations which I may have contracted with the persons with whom I have had an intercourse; but he does not succeed to my obligations towards God. *Grotius, lib.* 2, *chap.* 13, *n.* 17.

109. Saint Thomas, 11, 2. *q.* 89. *art.* 7. has also thought that a promise, although accompanied by an oath, is not indeed obligatory towards the person who had extorted it by an unlawful violence, but is obligatory towards God and in *foro conscientiæ*; that this obligation does not result from any vow or promise, but is founded on the reverence due to the holy name of God; which is violated, when we do not perform what we have promised by his name.

He adds nevertheless this modification, that after I have complied with my oath, in paying the thing I was compelled to promise under an oath, I may claim the money back, by law, if I be able to prove the unlawful violence exercised against me.

This modification is liable to an exception. Is it truly to pay a thing and to comply with an oath, to pay it, *dicis causa*, and with an intention of reclaiming what is paid?

Therefore, Gratius refutes this opinion, d. cap. 13, n. 13. *Probare non possum, quod a quibusdam traditum est, eum qui prædoni quicquam promiserit, momentanea solutione posse defungi, ita ut liceat quod solvit recuperare; verba enim juramenti, quod ad Deum, simplissime, & cum effectu sunt accipienda.*

110. The Popes have also decided that although a promise under oath, even when extorted by an unlawful violence is obligatory before God. *Alex. III. ch. 8. extra, de jurejur.* Celestinus III. says that from the Popes' absolution from the violation of this oath, they do not intend to induce those who make similar oaths to violate them, but only to treat such a violation with the indulgence to which venial faults have a claim, and not with the rigor due to a deadly sin. *Non ex dicatur ut juramenta non servent; sed si non ea attenderint, non ob hoc tanquam pro mortali crimine puniendi*, ch. 5, d. t.

111. Puffendorff, *IV.* 2. 8. thinks, on the contrary, that a promise extorted by violence, although confirmed by an oath, is no more obligatory before God than before men. His reasons are, that such an oath when addressed to the person to whom the promise is made, is only a solemn and religious recognition of the promise made to this person, but is not a vow. It does not contain a particular promise to God to perform that made to this person, nor would such promise, if admitted, be obligatory. For as promises, made to men, are only binding when accepted by those to whom they are made; so vows made to God bind only towards him when he may be believed to have acceded to and accepted them. Can it be believed that it is agreeable to God, and that he consents that an honest man should strip himself of his property, in favor of a wretch who has extorted a promise from him by an unjust violence?

As to the reverence due to the holy name of God, on which St. Thomas grounds his opinion, it cannot be denied that it is to fail in that reverence, and a great crime to promise under oath, although through violence, what one does not intend to perform: Since it is to make the name of God subservient to a lie, which Puffendorf admits. But

after the oath is taken, (whether the person actually intended at the time to perform his promise, in which case there was no crime, or whether he had not such an intention, in which case there was,) the breach of the oath does not appear to Puffendorf to be sinful or contrary to our duty to God. The repentance which the person who swore without an intention of performing, ought to have, seems to require him to give what he has promised, or in the other case the fear of scandal on weak minds may also induce a performance. But Puffendorff imagines it would be better to bestow the money in pious uses, rather than to give it to the person who extorted the promise, and who would use it in the further prosecution of his crimes.

112. There remains for us to say a word as to the case of fraud. It is not to be doubted that a promise, although supported by an oath, obtained by the fraud of the person to whom it is made, is no more obligatory towards him, than if he had extorted it by violence. For his fraud does not bind him the less to release it than violence would. But is such an oath obligatory towards God? According to the system of Puffendorf, who thinks that an oath extorted by violence is not binding, this ought not to be any more obligatory. But in adopting the opinion of Grotius and others, who think that an oath extorted by violence is binding, we need not conclude, that an oath, obtained by the fraud of the person who receives the promise, is obligatory. For when it appears that the oath is founded on a false supposition, without which the promise would not have been made, Grotius himself, *ibid*, *n.* 4. admits that the oath has no effect, even before God. The reason of this difference is this. He who promises, though he acts by compulsion, promises absolutely, without making his promise dependent on any condition; whilst the other intends to make his promise in a manner dependent on the truth of the fact he supposes, and which is the foundation of his promise.

SECTION THE SECOND.

Of the other causes of Obligations.

§. I.

Of quasi-contracts.

112. We call a quasi-contract, the act of a person, permitted by law, which binds him to another or another to him, without the intervention of any agreement between them.

For example. The acceptance of an inheritance by an heir is a quasi-contract, between him and the legatees: for it is an act permitted by law, which binds him to them to pay the legacies mentioned in the will of the deceased; without there having intervened any agreement between the heir and legatees.

Another example of a quasi-contract is when one pays, by an error of fact, what he does not owe. The payment of this thing is an act which binds the person who has received it to restore it to him who paid it; though it cannot be said in this case, that there has intervened any agreement for the restitution of it.

The administration which one undertakes of the affairs of another who is absent, and who did not request it, is also a quasi-contract which binds the one to account for his administration, and the other to refund to him his disbursements.

There are a number of other instances of quasi-contracts which we pass over in silence.

113. In contracts, it is the assent of the parties which produces the obligation. In quasi-contracts no assent intervenes: it is the law alone or natural equity which produces the obligation in rendering the act, from which it results, obligatory. For this reason such acts are called quasi-contracts: because, without being contracts and much less torts, they produce obligations as contracts do.

115. All persons, even minors and lunatics, who are incapable of assent, may by the quasi contract resulting from

the act of another, become bound to him, and bind him to them.

For it is not the assent which forms these obligations: they are contracted by the act of another without any act on our part. The use of reason is indeed required in him who does the act which forms a quasi-contract, but not in those by whom or to whom the obligations resulting from this act are contracted.

For example. If one has administered the affairs of a minor or a lunatic, his administration is a quasi-contract, which binds the minor or lunatic to allow him his useful expences, and reciprocally binds him to the minor or lunatic, to give an account of his administration.

The rule is the same with regard to feme coverts. They may in this manner become bound to others, and bind others to them, without the intervention of their husbands. For the law which prohibits them from binding themselves or doing any thing without their husbands, avoids only what they may do without their husbands' permission, but not the obligations resulting from an act in which they had no agency.

§. I.

Of torts and quasi-torts.

116. Torts are the third cause of obligations, and quasi-torts the fourth.

A tort is an act, by which, through fraud or malice, a person occasions damage or injury to another.

A quasi-tort is an act by which without malice, but through inexcusable imprudence, a person occasions damage or injury to another.

117. Torts and quasi-torts differ from quasi-contracts in this: that the act, from which a quasi-contract results, is an act permitted by the law, while that, which forms the tort or quasi-tort, is prohibited.

118. It results from the definition which we have given of torts and quasi torts, that it is only those persons, who have the use of their reason, who are capable of them. For

thoſe who have it not, as infants and lunatics, are incapable of malice or imprudence.

It is impoſſible to aſcertain the period at which perſons begin to have the uſe of reaſon, and are conſequently capable of malice; that period being earlier in ſome than in others. This is to be determined by circumſtances. But as ſoon as a perſon has the uſe of reaſon, and malice and reflection are perceived in an act by which he has cauſed an injury to another, that act is a tort: and the perſon who is guilty of it, although he has not yet reached the age of puberty, contracts the obligation of repairing the injury which he has occaſioned. Hence the maxim, *Neminem in delictis ætas excusat.* Imprudence is more readily excuſed in young perſons.

119. Although ebriety occaſions the loſs of reaſon, a perſon is no leſs bound to repair the injury which he has done to another, whilſt in that ſituation. For it is his own fault voluntarily to have placed himſelf in it. In this, a drunken man differs from an infant or lunatic, to whom no fault can be imputed.

120. It is not to be doubted that a perſon interdicted, on account of prodigality, is bound to the reparation of the injury which he occaſions by the torts or quaſi-torts which he commits, although he cannot contract any obligation by his agreements. The reaſon of this difference is obvious. Thoſe with whom he has contracted, ought to impute it to their own folly to have contracted with him. An interdiction is a public thing, and therefore ought to be known to them. But nothing can be imputed to thoſe to whom he has occaſioned an injury by his torts or quaſi-torts. They ought not to ſuffer from his interdiction: it ought not to procure him the impunity of his torts. This deciſion ſerves alſo to determine, that a perſon interdicted may be condemned to pecuniary fines for his torts or quaſi-torts, contrary to the opinion in the gloſs *ad L. Si quis, 7, Cod. Unde vi;* of Bartolus, and ſome other doctors, who ſay *Potest quidem se obligare ad pœnam corporalem, sed non ad pœnam pecuniariam, quia res suas alienare non potest.* For the interdiction is eſtabliſhed to prevent him from contracting indiſ-

rectly, and not to insure to him the impunity of his torts.

All that we have said of persons interdicted, is applicable to minors of the age of puberty, or near that age, who are yet under the power of a tutor: except that the faults of imprudence, which we call quasi-torts, are more readily excused in them, than in persons of age, interdicted on account of prodigality.

121. Not only is the person who has committed the tort or quasi-tort, bound to the reparation of the injury which he has caused: those who have this person under their power, as parents, tutors, preceptors, are liable to this obligation, whenever the tort or quasi-tort has been committed in their presence, and generally whenever, having it in their power to prevent it, they did not. But if they could not prevent it they are not liable, *Nullum crimen patitur is qui non prohibet, quum prohibere non potest*; L. 109, ff. *de Reg. Jur.* even if the tort was committed in their presence: *Culpa caret qui scit, sed prohibere non potest*; L. 50, ff, d. tit.

Masters are also rendered responsible for the injury occasioned by the torts and quasi-torts of their servants or workmen, employed in their service. They are so, even in cases in which it has not been in their power to prevent the tort or quasi-tort, when it has been committed, in the exercise of the duties to which they were employed by their masters; even in the absence of their masters: which has been established in order to render masters cautious, not to employ any but careful servants.

With regard to the torts and quasi-torts which they commit, when not actually employed about the affairs of their masters, the latter are not answerable.

122. Observe that those who are liable for the obligation from a tort committed by another person, in which they did not participate, are liable in a different manner than the trespasser. Although he is liable to be compelled by the imprisonment of his person, to the payment of the damages he may be condemned to, for the reparation of the injury which his tort has occasioned; when the tort is of a nature to authorize his imprisonment: the others who are

liable alſo, are only civilly ſo, and can be compelled to pay the damages, by the ſeizure of their property only, and not by the impriſonment of their perſons.

§. III.

Of the law.

123. Natural law is the cauſe, mediately at leaſt, of all obligations. For if contracts, torts or quaſi-torts produce obligations, it is, primitively, becauſe natural law requires that each ſhould perform what he promiſed, and repair the injury which he occaſioned by his tort.

It is alſo the ſame law that renders obligatory the acts from which an obligation reſults, and which are therefore called quaſi-contracts, as we have before remarked.

There are obligations of which the ſole and immediate cauſe is the law. For example: it is not by virtue of any contract that children are bound to maintain their indigent parents, when they have the ability. Natural law alone produces this obligation.

The obligation which a feme covert contracts to reſtore the money, which ſhe has borrowed without the authority of her huſband, when it has turned to her advantage, is not produced by any contract or quaſi contract: for the contract of loan which has been made with her, without his authority, being void, produces no obligation: *Quod nullum est, nullum producit effectum.* Her obligation is then produced by natural law alone, which does not permit any one to enrich himſelf at the expence of another. *Neminem æquum est cum alterius damno locupletari; L.* 206, ff. *de Reg. Jur.*

Theſe obligations produce an action which is called *condictio ex lege.*

SECTION THE THIRD.

Of the perſons between whom an obligation may exiſt.

124. There cannot be any obligation without two perſons, the one who contracts the obligation, the other to whom it is contracted.

He, in whoſe favor it is contracted, is called the creditor, and he, by whom it is contracted, the debtor.

125. Although it is of the eſſence of an obligation, that there be two perſons, one of whom is the creditor, and the other the debtor of it; yet the obligation is not extinguiſhed by the death of one or the other. For this perſon is preſumed to have ſurvived in the perſon of his heir, who ſucceeds to all his rights, and all his obligations.

126. Even if the creditor were to leave no heir, ſtill he would be preſumed to have ſurvived in his vacant eſtate. For the vacant eſtate of a deceaſed perſon, repreſents him, holds the place of his perſon, and ſucceeds to all his rights and all his obligations. *Hæreditas personæ defuncti vicem sustinet*, and this fictitious perſon either of the creditor or of the debtor, ſuffices to preſerve the obligation after the death of either.

Not only may an obligation continue to exiſt in favor or againſt the fictitious perſon of a vacant eſtate, but there are *certain* obligations which may be contracted by or to ſuch fictitious perſon.

For example. When a perſon who has been appointed curator to a vacant eſtate, adminiſters the goods of the eſtate, he contracts towards the perſon of the vacant eſtate, the obligation to render an account of his adminiſtration; and the fictitious perſon contracts towards the curator the obligation to allow him his reaſonable diſburſements, in the execution of the truſt.

A number of other examples might be adduced, of obligations contracted by a vacant eſtate: as that which it contracts to the perſon who buried the deceaſed, for his funeral dues. *Vice versa*, if any one ſteals goods, part of a vacant eſtate, or injures them, there reſults an obligation, which he contracts to the vacant eſtate.

127. Corporations are a kind of civil perſons, by whom and to whom obligations may be contracted.

128. It is clear that ideots, lunatics and infants, are incapable of contracting the obligations which reſult from torts and quaſi-torts, or even thoſe which reſult from contracts: ſince they are incapable of aſſent, without which there can be no contract, tort or quaſi-tort. But they are

capable of thoſe obligations which are contracted withou the act of the perſon by whom they are contracted. For ex ample. If any one has advantageouſly adminiſtered th affairs of an ideot, a lunatic or an infant, this infant, luna tic or ideot, contracts the obligation of allowing this perſo his uſeful diſburſements, in this adminiſtration, as we have already obſerved, *n.* 115. They contract alſo all the obliga tions which their tutors or curators, contract for them and in their names, *n.* 74.

By the Roman law, no obligation could be contracted between a father and the ſon who was under his power, un- leſs *ex certis causis; puta, ex causa castrensis peculji.* The reaſon was, that the ſon, while under the power of his fa- ther, *in vinculis paternis*, could not *extra has causas*, have a thing of his own, and acquired for his father all that he did acquire. But as paternal power has no ſuch effect with us, nothing prevents a father from contracting an obligation to his children or his children any to him.

SECTION THE FOURTH.

Of what may be the object and subject of obligations.

129. There can be no obligation, unleſs there be ſome- thing which is due and which is the object and ſubject of it.

§. I.

General thesis on what may be the object of obligations.

130. The object of an obligation may be a thing, pro- perly ſpeaking, *res*, which the debtor binds himſelf to give or an act, *factum*, which the debtor binds himſelf to do or not to do. This reſults from the definition which we have already given of an obligation.

Not only things themſelves may be the object of an obligation, but the uſe of a thing or the poſſeſſion of a thing may be the object of an obligation. For example. When one hires a thing, it is the uſe of that thing, rather than the thing itſelf, which is the object of the contract.

When one binds himſelf to give me a thing in pledge it is rather the poſſeſſion of the thing, than the thing itſelf

which is the object of his obligation. A number of other examples might be given.

§. II.

What things may be the object of an obligation.

151. Every thing, which is a subject of commerce, may be the object of an obligation.

Not only may a certain and determinate thing, as a certain horse, be the object of an obligation, but also an indeterminate thing may be the object of it, as when one binds himself to give me a horse, without mentioning what horse. It is necessary, however, that the indeterminate thing, which is the object of an obligation, have a certain moral consideration. *Oportet ut genus quod debetur, habeat certam finitionem*; as when one promises a horse, a cow, a hat, generally. But if the thing be so indeterminate, as to be reducible almost to nothing, there will be no obligation for want of a thing, which is the object and subject of it. For, morally speaking, almost nothing is regarded as nothing. For example. Money, corn, wine, without the quantity being determined or determinable, cannot be the object of an obligation; because that may be reduced to almost nothing, as a farthing, a grain of corn or a drop of wine. It is for this reason, that it is decided in L. 94, ff. *de Verb. Oblig.* that the stipulation *triticum dare oportere* produces no obligation: as it cannot be known what quantity the parties had in view.

Yet, it is not necessary that the quantity, which is the object of the obligation, be actually determined at the time the obligation is contracted, provided it be determinable. For example, if one binds himself to indemnify me for the damage which I have sustained or may sustain, on a certain account, the obligation is valid, though the sum to which it may amount is yet undetermined; because it is determinable by the estimation which may be made. Likewise, if one binds himself to supply me with corn for the use of my family, during one year, the obligation is valid, though the quantity be undetermined, because it is determinable, by the estimation which may be made of the quantity that will be necessary.

132. Things which do not yet exist, but the existence of which is expected, may be the object of an obligation, provided however the obligation depends on the condition of their existence.

For example, when I bind myself to a wine merchant to deliver him all the wine I shall make this year, the obligation is validly contracted, although the wine does not exist. But if my vines are killed by the frost, so that I can make no wine, the obligation vanishes, for want of a thing which is the object of it; as entirely as if it had never been contracted.

This rule, that future things may be the object of an obligation, admits of an exception in the civil law, with regard to future inheritances. This law proscribes, as indecorous and contrary to public honesty, all agreements relative to future inheritances; whether a person contracted for his own estate towards another person to whom he stipulated to leave it, even when this was part of a marriage settlement; L. 15, Cod. *de Pact.*; or whether the agreement related to the inheritance of a third person, which one of the parties expected; L. fin. Cod. *de Pact.*; unless this third person intervened and gave his assent to the agreement. *d. L. fin.*

Our jurisprudence, in favor of marriage, permits the introduction into marriage settlements, of agreements relating to future inheritances. We may by the marriage settlement of another person, bind ourselves to leave him our whole estate or part of it, or to leave it to the issue of this marriage. This is what we term the contractual institution of an heir, which is in use in marriage settlements, and of which we have spoken in the appendix to the title of inheritance, according to the custom of Orleans. It is likewise lawful in marriage settlements to make, for the benefit of either of the contracting parties, such a provision as may be agreed upon for the future disposition of the estate of a third person. The stipulation of *propres* estates in the lineal and collateral lines are agreements of this kind. We have treated of these in our general introduction to the custom of Orleans, *chap.* 3, *art.* 4. §. 3. Except in marriage settlements, agree-

ments relative to future inheritances are as much disallowed by our law as by the civil.

We ought not to mistake for a future inheritance, the substitution or trust estate of any property left to me by will to be restored to a third person at my death. This is no future inheritance, it makes no part of my property. It is a simple debt which I am bound to pay at my death, to those who were the object of the testator's beneficence, and relatively to which they may stipulate during my life with myself or others. L. 1 & 16, Cod. *de Pact.* L. 11, Cod. *de Trans.*

The rule that things which do not yet exist may be the object of an obligation, is liable to another exception by the laws of police; as those forbidding the sale of corn and hay before the harvest, wool before the shearing, and rendering such contracts void. *Traite de Police de Delamare.*

133. Not only may the things which belong to the debtor be the object of his obligation, but even those which do not, when he binds himself to give them: and he is bound to buy them from those to whom they belong, in order to give them to those to whom he has promised them.

If those to whom they belong did not wish to part with them, the debtor could not pretend to be discharged from his obligation, on the pretence that it is not in his power to perform it, and that one is not to be held to what is impossible: for the maxim *ad impossibilia nemo tenetur* is only true when the impossibility is absolute. But when the thing is possible of itself, the obligation does no less exist, although it be not in the power of the debtor to perform it; and he is liable for the damages resulting from its inexecution. It suffices that the thing was possible of itself, to justify the creditor in depending on the promise of the debtor. The debtor was in fault not to have considered, before he bound himself, whether it was in his power to do what he promised.

134. One may bind himself to give a thing which belongs to a third person, but cannot contract the obligation of giving to another what already belongs to him, unless it belonged to him but imperfectly, For in this case the obligation would

be valid ſo as to bind the debtor to cauſe the thing to belong perfectly to the other. *Traite du Contrat de Vente, n. 8 & ſeq.*

135. It is evident that things which are not a ſubject of commerce, cannot be the object of an obligation. For example, one cannot bind himſelf to give a church, a public ſquare, a canonſhip, &c.

Neither can one contract the obligation to give to another, what he is incapable of poſſeſſing. For example; a right of view, to one who does not poſſeſs the neighbouring houſe or ground. But it is unneceſſary that he who contracts to give a thing, ſhould be capable of owning and poſſeſſing it, provided he to whom he engages to give it be capable. L. 34, ff. de *Verb. oblig.*

The Edict of 1741, *art.* 14, having diſabled perſons of mortmain, from owning or poſſeſſing real eſtates, one cannot contract the obligation to give property of this kind to ſuch perſons.

Can a venal office be due to a woman? Yes: for though ſhe is incapable of holding the title of the office, ſhe is not incapable of holding the right of finance from it, and it is this right, which is a ſubject of commerce, that is the object of the obligation.

§. III.

What acts may be the object of an obligation.

136. In order that an act may be the object of an obligation, it muſt be poſſible. *Impossibilium nulla obligatio est;* L. 85, ff. *de R. J.*

But it ſuffices that the act for which a man binds himſelf to me is poſſible of itſelf, though it be impoſſible to him. For if I knew not that it was not poſſible to him, I had a right to depend on his promiſe, and he validly bound himſelf to me; *in id quanti mea interest non esse deceptum.* He ought to blame himſelf for not having conſidered his ability, and having raſhly bound himſelf to what was above it.

137. An act contrary to law or good morals, is like one

abſolutely impoſſible, and can no more be the object of an obligation.

That an act may be the object of an obligation, it is neceſſary alſo, that what the debtor engaged to do, be ſomething determinate. Therefore, if one binds himſelf to another to build him a houſe, without ſaying where, he contracts no obligation. *L.* 2, §. 5, ff. *de eo quod certo loco.*

138. The act which one binds himſelf to do or not to do, muſt be ſuch an act as the perſon to whom the obligation is contracted, has an intereſt to have done or not done; and ſuch intereſt muſt be appreciable.

The reaſon is evident. An obligation being a bond of right, there can be no obligation when he who promiſed to do or not to do may, with impunity, diſregard his promiſe. It is evident that he may, with impunity, diſregard it when I have no appreciable intereſt in his doing or not doing what he had promiſed. For damages cannot become due from him on account of the inexecution of his promiſe: damages being the eſtimation of the intereſt which the creditor has in the execution of the promiſe.

139. An act in which the perſon who ſtipulates has no intereſt, cannot indeed be the object of an obligation; but it may be the condition and charge of it. For example. If you ſhould agree with me that you will come and ſtudy law at Orleans, the agreement would be void, and no obligation would reſult therefrom. For this act, in which I have no intereſt, cannot be the object of an obligation towards me. But if we had agreed that I ſhould give you ten piſtoles if you came to ſtudy law at Orleans, or on condition that you ſhould come, the agreement would be valid. For this act, although it intereſts me in no wiſe, may be the condition or charge of the obligation reſulting from our agreement.

On this principle, the promiſe made by a nephew to his uncle not to play, under the penalty of paying him 300 livres, if he failed in his promiſe, was held to be valid, in a caſe reported by Maynard, and by Papon.

140. An act, to be the subject of a civil obligation, must be one in which the creditor to whom the obligation is contracted has an interest appreciable in money, according to the reasons mentioned before. But it is otherwise of the natural obligation: it suffices that the act which is the subject of it, be one in which the person to whom the obligation is contracted has an interest of just affection to render the obligation valid as a natural obligation. He who promised such an act and fails to do it, sins and becomes guilty in *foro conscientiæ*, although he cannot for the breach of his promise, be prosecuted in *foro legis*. See *supra*, *ch. 1. art. 6, §. 1.*

CHAPTER II.

ARTICLE THE FIRST.

Of the effect of Obligations on the part of the debtor.

§. I.

Of the obligation to give.

141. HE who has obliged himself to give a thing, is bound to give it, in a convenient time and place, to the creditor or some other person who has power or qualification to receive it in his stead. See *infra*, *Part III*, *chap. 1.*

142. When it is a determinate thing which is the object of the obligation, the obligation has the further effect with regard to the debtor, to bind him to use proper care in the preservation of the thing, until payment is made: and if for want of this care the thing happens to perish, to be lost or impaired, he is liable for the damages which may result. We shall treat of these damages, *infra*, *art. 3.*

The care which he ought to use for this preservation is different, according to the different nature of the contracts or quasi-contracts from which the obligation results.

When the contract is for the sole advantage of him to whom the thing is to be given or restored, the debtor who is

obliged to give or reſtore it, is bound only to uſe good faith in the preſervation of the thing, and is liable in this reſpect only for groſs neglect, which, on account of its enormity, is conſidered as fraud. *Tenetur duntaxat de lata culpa & dolo proximâ, L.* 5, §. 2, ff. *commodat.* For example. A depoſitary is held only to uſe good faith in the preſervation of the thing depoſited with him, and which he has bound himſelf to reſtore. Becauſe the contract of depoſit is made for the ſole advantage of the perſon who depoſited the thing, and to whom the depoſitary bound himſelf to reſtore it. If the contract be for the mutual advantage of the parties, the debtor is held to uſe in the preſervation of the thing, the ordinary care which prudent perſons beſtow on their own affairs, and conſequently will be liable for ſlight neglect. For example. The ſeller is liable for this neglect in regard to the thing ſold, which he obliged himſelf to deliver. The creditor is alſo liable in the ſame manner in regard to the thing which he received in pledge, and which he obliged himſelf to reſtore. Becauſe the contracts of ſale and of pledge are for the mutual advantage of the parties. If the contract is for the ſole advantage of the debtor, as is the contract of loan to uſe, he is bound to uſe in the preſervation of the thing, not only ordinary care, but every poſſible care; he is therefore liable for the ſlighteſt neglect.

This rule however, admits of ſeveral exceptions, as ſhall be ſhewn in particular treatiſes on the different contracts and quaſi-contracts.

As to accidents, and caſes of ſuperior force, *vis divinæ*, the debtor of a determinate thing, while he has not been in arrear in paying it, is not liable for them, unleſs he undertook ſpecially to anſwer for them, or the accident was occaſioned by ſome previous neglect on his part. As if I had lent you my horſe to go to a certain place, and you were attacked by robbers who have taken or killed it. Although this violence which you have ſuffered is an accident for which a debtor is not ordinarily liable; yet, if inſtead of taking the uſual or ſafeſt road, you took a bye-path, known to be infeſted with robbers, in which you were attacked, you will be li-

able for this accident, becauſe your own imprudence has occaſioned it.

143. It is another effect of the obligation to give, on the part of the debtor, that when he has been in arrear in diſcharging his obligation, he be liable to the creditor for the damage reſulting from this delay, and that he ought, conſequently to indemnify him to the amount of what he would have had, if the thing had been paid on demand.

It is a conſequence of this principle that if a thing due has been injured, or has wholly periſhed, ſince the arrear of the debtor, by accident or ſuperior force, the debtor is liable for the injury or loſs, provided the thing would not equally have periſhed or been impaired, had it been with the creditor.

It is likewiſe a conſequence of this principle that the debtor is liable to the creditor, not only for the profits received, but alſo for thoſe which might have been received by the creditor, ſince the arrear of the debtor. Of other ſpecies of damages, ſee *infra*, *art.* 3.

144. Note that according to our practice, the debtor is not reputed in arrear of paying the thing due, but after a judicial interpellation, validly made, and only from the day of the interpellation.

This is the caſe, although the thing be due to minors or the church. The principle of the civil law, relating to the arrear which is contracted, *re ipsa*, towards thoſe perſons, not being in uſe among us.

The rule has, however, an exception with regard to thieves, who are reputed in arrear of ſatisfying the obligato reſtore the thing ſtolen, from the moment they contracted it, by the theft, without there being occaſion, in regard to them, for any judicial interpellation; *L. fin. de Cond. furt.*

The debtor ceaſes to be in arrear of giving the thing due, by the valid tender of it, whereby he puts the creditor in arrear of receiving.

145. The obligation to give a thing, extends ſometimes to the fruits of it, when it produces any, and to intereſt, when what is due is a ſum of money.

Commonly, the debtor owes only the fruits which were or might have have been received since the judicial interpellation which has put him in arrear; and intereſt, likewiſe, runs only from that time. Sometimes, however, the fruits and intereſt are due before the arrear, as in the contract of ſale of a thing which is frugiferous. This depends on the different nature of contracts and other cauſes from which the obligations ariſe. We ſhall ſee this in treating of the different contracts and quaſi-contracts.

§. II.

Of the obligation to do or not to do.

146. The effect of the obligation, which a perſon contracts, to do a thing, is that he ought to do what he engaged to do; and that if he does not do it, after he has been put in arrear, he ought to be liable for the damage of the perſon to whom he contracted the obligation; that is to ſay, *in id quanti creditoris intersit factum fuisse, id quod promissum est*; which ought to be eſtimated in money by proper perſons named by the parties.

Commonly, the debtor cannot be put in arrear, but by the judicial interpellation, made to him by the creditor, to do what he promiſed, in order that on his failure he may be condemned to pay the damages.

The judge, on ſuch a demand, preſcribes a time within which the debtor ſhall be held to do what he has engaged, and on his failing to do it, within that time, condemns him to pay damages and coſts.

If the debtor diſcharges his obligation, within the time given, he avoids the damages and is only to be condemned to pay coſts; unleſs the judge conſiders that damages are due for the delay.

147. Sometimes, the debtor is held to pay damages to the creditor, on his failing to do what he promiſed, though no judicial interpellation was made. This happens when what the debtor bound himſelf to do could be effectually executed within a certain time only, which is paſt. For example. If I have employed an attorney to oppoſe, in my

behalf, the ſale of an eſtate which was mortgaged to me, and he has ſuffered a decree to paſs for the ſale of the eſtate, without oppoſing it; he is liable to pay damages for the injury I ſuſtain, although I made no demand on him for the performance of what he engaged to do: the time within which he ought to know the oppoſition was to be made, ſuffices for a demand.

148. The effect of the obligation which a perſon contracts not to do a thing, is that if he does it, he becomes liable for damages for the injury reſulting from his doing it, to the perſon to whom he bound himſelf not to do it.

149. When he who bound himſelf to do a thing, is prevented from doing it, by ſome accident or ſuperior force; likewiſe, when he who bound himſelf not to do a thing, is compelled to do it by ſome accident or ſuperior force; there is no ground for damages: for *nemo præstat casus fortuitos.*

Obſerve that, in this caſe, I ought to inform you of my being prevented from complying with my engagement; that you may take your meaſures accordingly; otherwiſe I could not avoid being condemned to pay damages, unleſs I were prevented by the ſame means from informing you. *L.* 27, §. 2, ff. *Mand.*

ARTICLE II.

Of the effect of the obligation in regard to the creditor.

150. The effects of the obligation, in regard to the creditor, are, I. the right which it gives him to proſecute the debtor, judicially, for the payment of that which is contained in the obligation.

II. When the obligation is of a liquidated ſum, it gives to the creditor the right of oppoſing it, as a ſet-off, to the amount of what he may owe to his debtor. We ſhall treat of this ſet-off, *infra, part* 3, *ch.* 4.

III. The obligation ſerves to the creditor as a ground for other obligations which ſecurities may contract with him for the perſon who contracted it. We ſhall ſpeak of theſe ſecurities, *infra, part* 2, *ch.* 6.

IV. It ſerves as the ſubject for a novation, when one intervenes. We ſhall ſpeak of novations; *infra, part* 3, *ch.* 2.

We ſhall treat, in this place, only of the firſt or principal effect of the obligation, which is the right it gives to creditor to demand, by judicial means, the payment of what is due. It is proper, in this reſpect, to diſtinguiſh the caſe in which the obligation is to give, from that in which it is to do or not to do.

§. 1.

Of the case in which the obligation is to give.

151. The right which the obligation gives to the creditor to proſecute for the payment of the thing which the debtor bound himſelf to give, is not a right which it gives him to the thing, *jus in re*; it is only a right againſt the perſon of the debtor to have him condemned to give the thing, *jus ad rem. Obligationum substantia non in eo consistit, ut aliquod corpus nostrum, aut servitutem nostram faciat, sed ut alium nobis obstringat ad dandum vel faciendum*; L. 3, ff. *de Obligat. & act.*

The thing which the debtor bound himſelf to give, continues ſtill to belong to him: and the creditor can become owner of it only by the actual or fictitious delivery, which the debtor may make, in diſcharge of his obligation. Until this delivery, the creditor has only the right to demand the thing; and he has that right only againſt the perſon of him who contracted the debt, his heirs or univerſal ſucceſſors; becauſe the heir ſucceeds to all the rights, and obligations of the anceſtor: and becauſe the univerſal ſucceſſor of the debtor, ſucceeding to his property, ſucceeds alſo to his debts, which are a charge on his property.

152. Hence it follows, that if my debtor, ſince he has contracted the obligation to give me a thing, has transferred it to another, either by ſale or gift, I cannot demand it from the buyer or donee, but only from my debtor; who, being unable to give it to me, as he no longer has it, ſhall be condemned to pay the damages reſulting from the inexecution of his obligation.

The reaſon is, that, according to our principles, the obligation not giving to the creditor any right in the thing which is due him, I have in the thing which is due me no right which I may proſecute againſt the perſon in whoſe hands it is. The right which the obligation gives, being a right which the creditor has againſt the debtor and thoſe who ſucceed to his whole property, I cannot have any action againſt the buyer, who, having acquired this thing alone, has not ſucceeded to the obligation of the perſon who was bound to me; *L. Quoties*, 15, *Cod. de Rei vind.*; *Paul, sent. V.* 11, 4.

For the ſame reaſon, if my debtor has bequeathed the thing which he had obliged himſelf to give me, at his death the property of it will be transferred to the legatee, according to the maxim, *Dominium rei legatæ statim a morte testatoris transit a testatore in legatarium.* For having, according to our principles, continued owner, he was able to transfer the property. It will be the legatee, then, who will obtain it; and I ſhall, in this caſe, have only an action for damages againſt the heir of my debtor; L. 32, ff. *locat.*

153. Note, however, that if the debtor, when he transferred to a third perſon the thing which he had obliged himſelf to give me, was not ſolvent, I might proſecute this third perſon to obtain a reſciſſion of the transfer made to him to the prejudice of my claim, provided he had been a partaker in the fraud, *consscius fraudis*, if he had acquired it for a valuable conſideration; if he had acquired it for a gratuitous conſideration, it would not even be neceſſary for this that he ſhould have partaken in the fraud. *Tit.* ff. *his quæ in fraud. cred.*

Note that if the ſale has been made before a notary, and the thing ſold is real property, I have a lien on it for the performance of the obligation which the perſon from whom I bought it contracted towards me; and I may proſecute the right which this lien gives me againſt a ſecond buyer, whom I find in poſſeſſion of the property. It is true, he may turn me back to the diſcuſſion of the property of the ſeller, for the damages which are due me and which re-

ſult from the inexecution of the obligation, contracted towards me: but if this diſcuſſion is fruitleſs, on account of the inſolvency of the ſeller, the ſecond buyer will be obliged to abandon the property to my lien, unleſs he prefers to pay the damages.

154. Although a perſonal obligation does not, of itſelf, give any right to the creditor in the thing which is the object of it; yet there are certain obligations, for the execution of which the thing that is the object of them is liable. This gives to the creditor a right in the thing and enables him to proſecute the obligation againſt third perſons who detain the thing. Such is, for example, the obligation which reſults from the clauſe of redemption, by which the buyer of an eſtate obliges himſelf to reconvey to the ſeller, when he may require it, on being reimburſed, all that he has expended. The eſtate, which is the object of the obligation of the buyer, is liable for the execution of this obligation, and the ſeller may proſecute the execution of it againſt a third perſon detaining the eſtate. But it is not the obligation that produces this lien; the obligation, of itſelf, is incapable of giving any right except againſt the perſon who contracted it. It reſults from this, that the ſeller in the ſale of the eſtate, is reputed to have retained the lien, for the obligation which the buyer has contracted towards him, in regard to the eſtate.

This lien is ſtronger than a mortgage. The creditor of a determinate thing, ſubject to his claim, may procure the poſſeſſor of it to be condemned to abandon the very thing, without being liable to be turned back by the poſſeſſor to the diſcuſſion of the property of the principal debtor, or to be paid, inſtead of the thing, the damages reſulting from the inexecution of the obligation.

155. As to the means which the creditor has to compel the debtor, his heir or univerſal ſucceſſor, to give what is due him, they are two: I. command and execution: II. ſimple demand.

The firſt is to make to the debtor, perſonally or at his

houſe, by an officer, a command to pay, and to ſeize, on his refuſal or neglect, his perſonal and even his real property, and cauſe it to be ſold to raiſe the money.

That the creditor may uſe this method of command and execution, three things muſt concur. I. The debt muſt be of a certain and liquidated ſum of money, or of a certain and liquidated quantity of ſuch things as are regulated by number, weight or meaſure; as corn, wine, &c. Obſerve, however, that although one may ſeize for a debt of the laſt kind, when the quantity is liquidated, it is neceſſary to poſtpone the ſale until an appraiſement is made. *Ord.* 1667, *tit.* 3, *art.* 2.

II. It is, commonly, neceſſary that the creditor have a title of execution; that is to ſay, an inſtrument executed before a Notary, cloathed with all due formalities, by which the debtor ſhould have obliged himſelf to pay; or a judgment, whereby he has been condemned, which ſhould not be ſuſpended by appeal, writ of error, &c. *See Introduction au titre* 20 *de la Coutume d'Orleans, chap.* 2, §. 1. I have ſaid *commonly*, becauſe, in the cuſtom of Orleans, a landlord &c. may proceed by execution for three quarters. *Orleans, art.* 406.

III. It is neceſſary that it be againſt the perſon, who obliged himſelf before the Notary, or againſt whom the judgment was had, that the creditor thus proceeds. For although the heirs of this debtor ſucceed to his obligations, the creditor can only proceed againſt them by the way of ſimple demand, until they give him a new title before a Notary, or the creditor obtains judgment againſt them.

When theſe things concur, the creditor is entitled to execution, and is not permitted to proceed by the way of ſimple demand.

Simple demand is the method which the creditor who is not entitled to execution, is to take; it is to cite the debtor before a competent tribunal, and obtain judgment againſt him.

156. When the thing due is a determinate thing, and

the debtor, against whom there is judgment that it be given, has it in his poſſeſſion, the Judge, on the petition of the creditor, ought to permit him to have it ſeized, and thus obtain poſſeſſion of it; and it does not avail the debtor to offer in this caſe, to pay the damages reſulting from the inexecution of his obligation. *Traite du Contrat de Vente, n.* 57.

§. II.

Of the case in which the obligation is to do, or not to do.

157. When a perſon has obliged himſelf to do a thing, the obligation does not give to his creditor the right of compelling him to do, ſpecifically, the thing to which he bound himſelf, but only to procure him to be condemned to damages, on his failing to perform his obligation.

It is in this obligation of paying damages, that all obligations to do or not to do, reſolve themſelves. *Nemo potest præcise cogi ad factum.*

158. When one has obliged himſelf not to do a thing, the right which this obligation veſts in the creditor, is that of proſecuting the debtor, judicially, in caſe he contravenes his obligation, and to have him condemned to the damages reſulting thereſrom.

If that which he obliged himſelf not to do, and has done contrary to his obligation, is ſomething which may be undone, the creditor may alſo demand that it may be ſo. For example. If my neighbour has obliged himſelf not to ſhut up his avenue, but to leave me a free paſſage, and contrary to his obligation, he has erected a fence, or dug a ditch acroſs it; I may procure a decree that he be held to pull down the fence or fill up the ditch, and that on his failing to do it within a certain time, I may be authorized to procure it to be done at his coſt.

Article III.

Of the damages resulting either from the inexecution of obligations, or from delay in their execution.

159. We call *damages* the loſs which a perſon has ſuſtained, and the profit which he has failed to make. *Quan-*

tum mea interfuit ; id est, quantum mihi abest, quantumque lucrari potui ; L. 13, ff, *Rat. rem hab.*

When therefore, it is said that the debtor is bound to pay the damages of the creditor, resulting from his failing to perform his obligation, it is meant that he ought to pay the creditor for the loss which he has occasioned him, and the gain which he has deprived him of, by failing to perform his obligation.

160. The debtor, however, ought not to be subjected to indemnify the creditor for all the losses, indiscriminately, which the inexecution of the obligation may have occasioned him, and much less for all the profits he might have made, if the debtor had performed his obligation. It is proper, in this respect, to take notice of different cases, and different kinds of damages, and according to circumstances, to use moderation, in the assessment of those with which he is chargeable.

When no fraud can be imputed to the debtor, and it is only by simple fault that he has not performed his obligation, either because he rashly undertook what he could not accomplish, or because he has since, by his own inattention, disabled himself from performing it ; he ought only to be charged with the damages, which it could have been foreseen at the time of the contract, that the creditor might sustain from the inexecution of the obligation ; for the debtor is presumed to have submitted to these only.

161. Commonly, the parties are presumed to have foreseen only the damages which the creditor might sustain from the inexecution of the obligation, in regard to the things which was the object of it, and not those which the failure of the debtor may occasion him, in regard to the rest of his property. Therefore in this case, the debtor is not chargeable with these, but only with such as are suffered with regard to the thing itself, which was the object of the obligation ; *damni & interesse, propter ipsam rem non habitam.*

For example. Suppose I had sold a horse, which I obliged myself to deliver to the buyer within a certain time, and

which I was not able to deliver. If, in the meanwhile, the value of horſes has riſen, and the buyer has been compelled to give a higher price for another horſe of the ſame kind, which he was under a neceſſity to buy from another perſon; this is a damage for which I ſhall be obliged to indemnify him. For it is a damage which he ſuffered *propter ipsam rem non habitam*, and which relates only to the thing which was the object of the contract, and which I could have foreſeen that he might ſuſtain. But if the buyer was a canon, who, for want of the horſe which I had engaged to deliver him, and being unable to find another, could not arrive at his church early enough to become entitled to certain extra tithes, I ſhall not be chargeable with the loſs of theſe extra tithes, although it was occaſioned by the inexecution of my obligation; becauſe it is a damage which is foreign to what was the object of the obligation, which was not foreſeen at the time of the contract, and to the reparation of which I cannot be ſaid to have ſubmitted in contracting.

Likewiſe, if I have leaſed to another, for eighteen years, a houſe which I believed, *bonâ fide*, to belong to me, and at the end of ten or twelve years my leſſee was evicted by the true owner, I ſhall be chargeable with the damages of the leſſee, reſulting from his having been obliged, by a riſe in the price of houſe-rent, to pay a higher rent for a houſe of the ſame kind, during the remainder of the leaſe, as well as from the expences of his removal. For theſe damages have a near relation to the enjoyment of the houſe, which was the object of my obligation, and are ſuffered by the leſſee *propter ipsam rem non habitam*.

But if the leſſee had eſtabliſhed a lucrative branch of trade in the houſe, ſince the beginning of the leaſe, and his removal has occaſioned to him the loſs of many of his cuſtomers and injured him much in his trade, I ſhall not be obliged to indemnify him for this injury, which was foreign to, and was not foreſeen at the time of, the contract.

A fortiori, if in the removal, ſome valuable pieces of furniture of the leſſee were broken, I ſhall not be liable for this loſs; for it is the unſkilfulneſs of the people whom he

employed, which is the cauſe of it, and not the eviction, which is only the occaſion of it.

162. Sometimes the debtor is liable even for the damages of the creditor, although extrinſic; this happens when it appears that they were foreſeen at the time of the contract and the debtor expreſsly or impliedly charged himſelf with them, in the caſe of his failure to perform his obligation. For example. I have ſold my horſe to a canon, and there was an expreſs clauſe in our bargain, by which I obliged myſelf to deliver it to him early enough to arrive at his church in time to ſecure his extra tithes. If, in this caſe, I fail by my fault, although without fraud, to perform my obligation, and this canon could not eaſily find another horſe, or otherwiſe procure a conveyance, I ſhall be chargeable with the extrinſic damages reſulting from the loſs of his extra-tithes. For by the clauſe in our bargain, the riſk of this damage was foreſeen and expreſſed, and I am preſumed to have charged myſelf with it.

Likewiſe, if I have leaſed my houſe to a merchant to keep a ſtore, or to an innkeeper to keep an inn, and the leſſee is evicted, the damages which he will have a right to claim from me, ſhall not be confined to the expences of his removal and the advanced rent he may be obliged to give, as we have ſaid they ſhould in the inſtance before adduced; the loſs he may ſuſtain in his buſineſs, if unable to procure a houſe during the quarter, muſt alſo be conſidered; for in renting to him my houſe for a ſtore or tavern, the riſk of this kind of damage was foreſeen, and I am preſumed to have impliedly ſubmitted to it.

163. Another example of our diſtinction. I have bought ſeveral pieces of timber, which I made uſe of to ſtanchion my building, which fell down from the defect in theſe pieces, which were rotten. If the ſeller was not a perſon profeſſing that kind of trade, and ſold me the timber *bona fide*, being himſelf ignorant of its defect, the damages I ſhall have a right to, on account of the failure of the ſtanchions, will only be a deduction from the price I gave him, in buying for ſound timber that which was otherwiſe; they will not

extend to the loſs I ſuſtain from the fall of the building. For the ſeller who ſold the timber *bonæ fide*, and who was not bound to be acquainted with its quality any more than myſelf, cannot be preſumed to have undertaken to charge himſelf with for riſk. L. 13, ff. *de act. empt.*

But if the ſeller profeſſed that particular trade, if he was a carpenter who ſold to me thoſe ſtanchions for my building, he will be liable for the damages reſulting from the fall of the building, occaſioned by the inſufficiency of ſuch ſtanchions. He will not be admitted to alledge that he thought them good and ſufficient, and even if this were the caſe, his ignorance in regard to a matter relating to the art or trade which he publicly profeſſed, would not excuſe him. *Imperitia culpæ annumeratur;* L. 132, ff. *de R. J.* In ſelling me theſe pieces of timber to ſtanchion my building, and ſelling them as a carpenter, he is preſumed to have engaged that they would prove ſufficient, and to have taken on himſelf the riſk of the building, if they did not. *Molin. Tract. de eo quod interest, n.* 51.

Obſerve, nevertheleſs, that he ought only to be charged with the riſk which he undertook. Therefore if the carpenter ſold me theſe ſtanchions for a certain houſe, and I uſed them for one much larger, he will not be anſwerable for the fall of the latter, if the ſtanchions were ſufficient for the former, for which they were intended, becauſe, in this caſe, he was in no fault. But even if he had been in fault, the ſtanchions being abſolutely bad and inſufficient even for the ſmaller houſe, for which they were intended, he will only be liable for the damages reſulting from the fall of the large houſe, to the amount of the value of the ſmall one. For having ſold theſe ſtanchions only for the ſmall houſe, he intended to make himſelf liable only for the damages which I might ſuffer, to the amount of the value of the ſmall houſe: conſequently he ought not, according to our principle, to be bound farther. Perhaps he would have thought more on the ſubject, if he had underſtood he was to run a greater riſk and that he was ſelling the ſtanchions for the large houſe. *Molint ibid. n.* 62.

For a like reaſon, Dumoulin is of opinion, that when a

carpenter has ſold me ſtanchions for a houſe, which, from their inſufficiency, has fallen down, the damages with which he is chargeable, are to be confined to the injury which the houſe has received and cannot be extended to the loſs of the furniture that was in it, and which was broken or loſt in the fall. For this man, in ſelling me theſe ſtanchions to ſupport my houſe, undertook to anſwer for the ſafety of the houſe alone. It is againſt this riſk only that he undertook to indemnify me, and not againſt the loſs of the furniture, which he could not foreſee that I would leave in the houſe, it being cuſtomary to remove the furniture of a houſe which is to be ſtanchioned: therefore the carpenter ought not to be charged with the loſs of the furniture, unleſs he expreſsly took the riſk of it on himſelf. *Molin, ibid. n.* 63 & 64.

It would be otherwiſe in the caſe of a maſon, who having contracted to build me a houſe, which, ſoon after it was finiſhed, fell down, owing to its not having been built in a workmanlike manner. The damages to which this unſkilful maſon would be holden, for having failed in his contract, would extend not only to the loſs of the houſe, but alſo to that of the furniture which was in it and could not be ſaved. For this maſon, in contracting to build the houſe, could not be ignorant that furniture would be brought into it, and that it could not be uſed without furniture; conſequently he took on himſelf the riſk of the furniture. *Molin, ibid. n.* 64.

164. As to the damages to which a debtor is holden, on account of his failure to perform his obligation, in caſes in which no fraud can be imputed to him, it remains for us to obſerve, that when theſe damages are conſiderable, they ought not to be aſſeſſed rigorouſly, but with a certain moderation.

It is on this principle that Juſtinian, *Cod. de Sentent. quæ pro eo quod interest*, directs that the damages, *in casibus certis*, that is to ſay, as Dumoulin explains it, *ibid. n.* 42 & *seq.* when they relate only to the thing which was the object of the obligation, are not to be aſſeſſed above double the value of the thing, this value being included.

This is applicable to the following caſe. I have bought

for 4000 livres an eſtate, with a vineyard, in a diſtant county. At the time of the purchaſe, wine, the only produce made on this eſtate, was very low in that county, there being little demand for it in the neighbourhood and no way of conveying it to a market. Since that time, the king has cauſed a canal to be cut near the eſtate, through which produce may eaſily be conveyed to a good market, and the price of wine has increaſed fourfold: ſo that the eſtate, which I bought for 4000 livres, is now really worth more than 16000. It is evident, that if I be evicted, the damages reſulting from the eviction, which are nothing elſe than *id quanti mihi hodie interest hunc fundum habere licere*, amount in reality to more than 16000. Yet according to the law of Juſtinian, for the damages which are due me, as well for the increaſed value of the eſtate as the coſts of the purchaſe, the ſeller, who ſold it to me *bona fide*, can only be charged with 8000 livres, including the purchaſe money. Becauſe the damages, which, in this caſe, are due only *propter rem non habitam & in casu certo*, cannot, according to this law, exceed double the price of the thing which was the object of the obligation.

The reaſon is, that obligations which reſult from contracts can only be produced by the intention and aſſent of the parties. The debtor, in obliging himſelf for the damages which may reſult from the inexecution of his obligation, is preſumed to have meant to bind himſelf no farther than what he could probably foreſee thoſe damages might extend to, and not beyond this: ſo that when theſe damages happen to amount to an exceſſive ſum, far above what the debtor could reaſonably be expected to foreſee, they ought to be moderated and reduced to the ſum to which it might probably have been foreſeen, that they would at moſt amount to; it not being to be preſumed that the debtor intended to bind himſelf farther. *Molin. Tract. de eo quod interest, n.* 60.

This law of Juſtinian, inaſmuch as it confines the reduction of the damages preciſely to double the value of the thing, is an arbitrary law, which has no binding force with us. But the principle whereon it is grounded, which does

not allow a debtor, who can be charged with no fraud, to be made liable for the damages resulting from the inexecution of his obligation, above the sum to which he may reasonably have imagined they would amount, being grounded on natural law and equity, we ought to follow it, and consequently to reduce the damages when they happen to be excessive, leaving the quantum of this reduction to the discretion of the judge.

165. It is evident that the principle of reducing the damages to double the value of the thing which was the object of the primitive obligation, is applicable to those only which are due in regard to the thing itself; and that it cannot be extended to those which the creditor has sustained, extrinsically, in regard to the rest of his property, when the debtor has expressly or impliedly submitted to them. For these damages, not being due on account of the thing which is the object of the primitive obligation, cannot be regulated by the value of this thing; they may sometimes amount to tenfold and more. For example. The damages which are due me by a cooper, who has sold me leaky casks, resulting from the loss of the wine which I put in them, may amount to more than tenfold the value of the casks; for in selling me the casks, as a cooper, he made himself responsible for their goodness and tacitly charged himself with the risk of the loss of the wine, which might amount to ten or twenty times more than the price of the casks. This kind of damage, not referring to the casks but to the wine which was put in them, ought not to be regulated by the price of the casks. *Molin. ibid. n.* 49.

Nevertheless, even in the case of extrinsic damages, moderation ought to be used when they are excessive, and the debtor ought not to be charged with more than the highest sum to which he could have foreseen they might amount. For example. If I have put foreign wine or other liquor of immense value, which was lost on account of some defect in the cask, the cooper, who sold it to me, ought not to be obliged to compensate me for the whole loss, but only to the amount of the value of a cask of the best wine of the country: for when he sold me the cask, he could not foresee

that I was going to put in it any liquor of greater value, and did not therefore intend to charge himself with any further risk. *Molin. ibid. n.* 60.

On the same principle, the mason who built my house, which fell down on account of some defect in building it, is bound, as we have seen before, to compensate me for the loss of the furniture broken or lost in the fall. But if I had precious stones or valuable manuscripts which were lost, he ought not to be chargeable with the entire loss: his obligation would not extend farther than to the ordinary value of the furniture of a person of my rank.

166. The principle which we have thus far established, is not applicable, when the damages have been occasioned by the fraud of my debtor. In such case he is chargeable with all the damages I have suffered, which were occasioned by his fraud; not only those I have suffered on account of the thing which was the object of the contract, *propter rem ipsam*; but those also, I have suffered in regard to the rest of my goods: without there being any occasion to distinguish or enquire whether the debtor is presumed to have submitted thereto. For he who is guilty of a fraud obliges himself *velit, nolit*, to the reparation of every injury which results from it. *Molin, n.* 155.

For example. If a dealer in cattle, sold to me a cow, which he knew was infested with a contagious distemper, and which he concealed from me; this concealment on his part is a fraud, which makes him responsible for the injury I sustained not only in the cow itself which he sold me, and which is the object of the primitive obligation, but likewise for what I may suffer in my other cattle to which she may have communicated the distemper. *L.* 13, ff. *de act. empt.* For it is the fraud of the seller which has occasioned all this damage.

167. As to other damages which I have sustained, and which are a more distant and indirect consequence of the fraud of the seller, will he be answerable for them? For example. If, extending the same case farther, the distemper which was communicated to my oxen, by the cow he sold

me, prevented me from cultivating my land; the damage I ſuffer from its remaining uncultivated, ſeems to be a conſequence of his fraud who ſold me a diſtempered cow; but it is a conſequence more diſtant than the loſs which I ſuſtained from the communication of the diſtemper to my cattle. Will this perſon be anſwerable for it? *Quid*, if the loſs of my cattle and the damage which I have ſuſtained from being unable to make a crop in conſequence thereof, diſables me from paying my debts, and my creditors proſecute me and ſell my goods for a trifling ſum; will the ſeller be chargeable with this loſs? The rule which appears to me proper to be followed in this caſe, is that we ought not to include in the damages with which a debtor is chargeable on account of his fraud, ſuch damages as are only a diſtant and not a neceſſary conſequence of it, and which may have proceeded from other cauſes. For example. In the preſent caſe the ſeller will not be chargeable with the loſs I ſuſtained from the ſale of my goods, which is a very remote and indirect conſequence of his fraud, and has no neceſſary relation to it; for although the loſs of my cattle, which was occaſioned by his fraud, has had an influence in the derangement of my affairs, this derangement may have had other cauſes.

This is conformable to the doctrine laid down by Dumoulin, in ſpeaking of the damages with which the leſſee of a houſe, who has maliciouſly ſet fire to it, is chargeable. *Et adhuc. in doloso intelligitur venire omne detrimentum tunc & proxime secutum, non autem damnum postea succedens ex novo casu, etiam occasione dictæ combustionis, sine qua non contigisset; quia istud est damnum remotum, quod non est in consideratione. Dumoulin, ibid. n.* 179.

The loſs which I have ſuſtained from failing to cultivate my land, ſeems to be a remote conſequence of the fraud of the ſeller. Yet I think he ought not to be chargeable with it, at leaſt not with the whole. This failure is not abſolutely a neceſſary conſequence of the loſs of my cattle, occaſioned by the fraud of the ſeller. I might, notwithſtanding the loſs of my cattle, have prevented my land from remaining uncultivated, by buying other cattle; or, if I was not able

to buy, by hiring others, or by leasing the land if I had no way to cultivate it myself. But as, by recurring to these expedients, I should not make as much out of the land as if I had cultivated it myself with my own cattle, which I lost by the fraud of the seller, this ought to be considered in assessing the damages with which he is chargeable.

168. The damages which result from the fraud of the debtor, differ still from the ordinary damages in this, that the moderation which according to the principles of the civil law, *Cod. de sent. quæ pro eo quod interest*, is observed in regard to ordinary damages, is not observed in regard to *those* which result from the fraud of the debtor. The reason of this difference is evident. The moderation which is observed in regard to ordinary damages, is grounded on the principle which we have already established, that a debtor cannot be presumed to have meant to oblige himself to more than the highest sum to which he may have imagined the damages that might result from the inexecution of his obligation would amount. This principle cannot be applied to the damages which are occasioned by fraud. For whoever is guilty of fraud binds himself *velit, nolit*, to the reparation of the injury which it may occasion; *ut supra*.

It ought nevertheless to be left to the prudence of the Judge, even in the case of fraud, to use some indulgence in assessing the damages.

These principles apply whether the fraud be committed *delinquendo* or *contrahendo*; *Molin, ibid. n.* 153.

169. It remains for us to say a word respecting the damages resulting from the delay of the debtor in the execution of his obligation.

A debtor is not only chargeable with the damages of the creditor, which result from the absolute inexecution of his obligation, when he does not perform it; but likewise with those which result from his delay in the execution of it, when he is put in arrear.

These damages consist in the loss which the creditor has sustained and the profit of which he has been deprived, by the delay; provided they be a necessary consequence of it.

They are aſſeſſed with rigor and extended to every kind of loſs, when it is by fraud or obſtinacy that the debtor has delayed the performance of his obligation.

But when negligence alone can be imputed to him, theſe damages ought to be aſſeſſed with much more moderation, and are to be confined to ſuch as may have been foreſeen at the time of the contract, and to which the debtor expreſsly or impliedly ſubmitted.

170. Such are the general rules. A particular one is followed with regard to the delay in the performance of obligations which conſiſt in giving a certain ſum of money. As the different damages which may reſult from delay in the performance of obligations of this kind, vary infinitely and as it is as difficult to foreſee as to prove them, it has been found expedient to reduce them, by a ſort of average, to a ſtandard. This has been done by fixing them to the intereſt due according to the rate eſtabliſhed by law.

This intereſt begins to run againſt the debtor from the day he has been put in arrear, until payment; becauſe they are the common price or value of the lawful profit which the creditor might have drawn from the ſum which was due him, if it had been paid.

In conſequence of this ſort of average, however great the damages may be which the creditor ſuſtains from the delay of payment of the ſum due, whether it proceeds from the negligence, fraud or obſtinacy of the debtor, the creditor can have no other compenſation than the intereſt.

But, on the other ſide, he is not compelled, in order to obtain it, to prove that any damage reſulted from the delay of payment.

171. This rule, however, admits of an exception with regard to bills of exchange. When the perſon on whom a bill of exchange is drawn, refuſes to pay it as it becomes due, the bearer of it, on cauſing it to be duly proteſted, may, by way of damages for the delay which he ſuffers, require from the drawer or endorſers the re-exchange, although it would exceed the ordinary rate of intereſt. We

call re-exchange the profit paid to a banker, to procure money on bills of exchange, in lieu of the money which was to have been received on the spot. *Traite des Lettres de change*, n. 64.

172. Such are the rules by which courts decide; but in a moral view, when the creditor has suffered no damage from the delay of payment of the sum which was due him, that is to say, when this delay has occasioned him no loss, and has deprived him of no gain, he ought not to demand interest: for interest is only granted as a compensation, and no compensation can be due to him who has suffered no damage.

Vice versa, if the damage which the delay has occasioned to the creditor, be greater than the amount of the interest, the debtor is bound in conscience, when he has delayed payment by fraud or obstinacy, to compensate the creditor fully for all the damages he knows him to have sustained in consequence of the unjust delay. It does not suffice to pay the interest from the time of the arrear.

It is otherwise when there has been, on the part of the debtor, no fraud in the delay. The reason of this difference is that, except in cases of fraud, a debtor is only chargeable with the damages to which he is presumed to have submitted, which, in this case, are the interest since he was in arrear.

Another difference between the principles which are considered in *foro legis* and those in *foro conscientiæ*, is that, according to the former, it is not always necessary that there should have been a judicial interpellation to put the debtor in arrear, in order that interest may run against him. For if my creditor tells me he wants his money, and, at my request, in order to oblige me and to avoid injuring my credit, he refrains from making a judicial interpellation, depending on my honesty and the promise I made him to indemnify him in the same manner as if he had proceeded judicially; I am in this case, in a moral view, sufficiently put in arrear by his request, and am obliged to pay him the interest that will afterwards accrue. It is without foundation, that the

author of the Conferences of Paris, on Uſury, vol. 1, page 379, *et seq.* rejects this intereſt as uſurious. There is no uſurious intereſt, but that which is demanded as the reward of a loan which ought to be gratuitous; but this has a juſt conſideration, viz. the compenſation of the injury which I occaſion to my creditor by the delay in the execution of my obligation. This author grounds his opinion on the following reaſoning. We hold, ſays he, our rights and our property from the law alone. Our law grants to the creditor the right of demanding intereſt on the ſums which are due him, only when they are given by a judgment after a judicial interpellation: therefore, concludes this author, without a judicial interpellation, a creditor has no right to demand intereſt on the ſum due him, and he cannot conſcientiouſly receive it.

The anſwer is, that if the creditor cannot, in *foro legis*, demand intereſt, without a judicial interpellation, it is becauſe he cannot, without this, prove that the creditor has been in arrear. A judicial interpellation being the only legal evidence of the arrear. But if the debtor has been really in arrear, the creditor has a right to receive intereſt as a compenſation for the injury which the delay has occaſioned him. He holds this right from the moſt reſpectable of all laws, the law of nature, which binds every debtor to perform his obligation and to indemnify his creditor for the injury he may ſuſtain from the delay. When the creditor, from a regard for his debtor, forbears to have recourſe to a judicial interpellation, which might ruin the credit of his debtor, it is a ſervice which he renders him; the creditor ought not to ſuffer for having rendered this ſervice to his debtor. *Officium ſuum nemini debet eſſe damnosum.* It is an abſurdity to ſay that the creditor, becauſe he has indulged the debtor, ought to be in a worſe ſituation than if he had treated him with rigor.

SECOND PART.

Of the different kinds of obligations.

CHAPTER THE FIRST.

A general exposition of the different kinds of obligations.

§. I.

First division.

173. THE firſt diviſion of obligations is derived from the nature of the duty, which they create. Obligations conſidered in this reſpect are divided into I. natural and civil obligations; II. civil obligations; and III. natural obligations.

We call a *civil obligation* that which is a bond of right, *vinculum juris*, and which gives to the party to whom it is contracted, the right of requiring, by law, the performance of it.

We call a *natural obligation* that which, in honor and conſcience, binds him who contracted it to the performance of it.

174. Obligations are commonly both civil and natural. There are, however, ſome which are merely civil obligations, without being alſo natural, to the performance of which the debtor may be conſtrained by law, although they be not binding in conſcience. Such is the obligation which reſults from a judgment erroneous in law or in fact, when the time, within which it might have been reverſed, is paſt; or from an unjuſt judgment, from which there is no appeal. In either caſe the defendant is bound by the judgment and may be conſtrained by legal means to pay, what in conſcience he does not owe. It is the authority of the judgment, *rei judicatæ*, which forms this obligation. The deciſory oath produces a like obligation. The defendant, who has

deferred it to the plaintiff, is bound by this to pay what is thus ſworn to be due; although in truth and conſcience he does not owe it.

175. There are alſo obligations which are mere natural obligations, without being alſo civil. Theſe obligations in honor and conſcience bind thoſe who contract them to the performance of them; but the municipal law gives no action to thoſe to whom they are contracted for enforcing the performance of them.

Theſe are improperly called obligations; for they are no bond of right, *vinculum juris*: they do not impoſe upon the party an abſolute neceſſity to perform them, ſince he cannot be conſtrained thereto by the perſon with whom he contracted them. It is, however, this *necessity* which conſtitutes the character of the obligation, *vinculum juris quo necessitate adstringimur*; they are merely *pudoris & æquitatis vinculum*.

We ſhall treat particularly of this kind of obligation in the following chapter.

§. II.

Second diviſion.

176. The ſecond diviſion of obligations is derived from the different manner in which they are contracted. In this reſpect we divide them into abſolute or conditional.

Abſolute obligations, are thoſe which are not ſuſpended by any condition: whether they were originally contracted without any condition, or under ſuch conditions as have ſince been performed.

Conditional obligations are thoſe which are ſuſpended by ſome condition, under which they were contracted, and which is not yet performed.

177. We call abſolute obligations in a more confined ſenſe, thoſe which are contracted without any of the following modifications; a condition of defeaſance, a time limited for the duration of the obligation, a time and place of payment, the right to pay to ſome other perſon than the creditor,

or to pay another thing than that which is the object of the obligation. The alternative of different things which are the object of the obligation, the joining of several creditors or several debtors, are also modifications.

All these different modifications make as many different kinds of obligations of which we shall treat in the third chapter.

§. III.

Third, fourth and fifth divisions.

178. These divisions are derived from the quality of the different things which are the object of obligation.

There are obligations *to give* and obligations *to do*. *Stipulationum quædam in dando, quædam in faciendo;* L. 3, ff. *de Verb. obl.*

Obligations to do, comprehend also those by which a person obliges himself not to do.

There is this difference between obligations to give, and obligations to do. He who has obliged himself to give a thing, may when he has it in possession, be constrained to give the thing itself; the creditor may, against his opposition, obtain the possession of it by legal means; whereas he who has obliged himself to do a thing cannot be constrained to do it specifically: on his failing to perform his obligation, it resolves itself into an obligation to pay the damages which result from his failure, and these damages consist in a sum of money liquidated by proper persons, appointed by the parties or the court.

179. We divide obligations or debts, farther, into debts liquidated and unliquidated.

Liquidated debts are those of a thing certain. *Obligatio rei certæ.* Gaius defines them: *Certum est quod ex ipsa pronuntiatione apparet quid, quale, quantumque sit;* L. 74, §. 1, ff. *de Verb. obl.* Such are the debts of a determinate chattel, a certain quantity of wine, corn, &c. a certain sum of money.

A debt is unliquidated when the thing or sum which is due, is not yet ascertained; *ubi non apparet quid, quale, quan-*

tumquè est in stipulatione; L. 75, ff. *dict. tit.* Such are debts of damages, until they are unliquidated, and consequently all obligations to do or not to do; *d. L.* 75, §. 7, since they resolve themselves into debts of damages. Debts of a thing indeterminate, or in the alternative, until the debtor has made his election, or until, on failure of the debtor, they are demanded by suit, are also unliquidated debts; *d. L.* 75, §. 1, §. 8. See *Pand. Justin. tit. de Verb. oblig. n.* 78, 79, 80, 81.

There are several differences between liquidated and unliquidated debts. The creditor of a liquidated debt, when he has a title of execution, may proceed by command and seizure of the property of the debtor; the creditor of an unliquidated debt cannot. A liquidated debt may be pleaded as a set off to another liquidated debt; an unliquidated debt cannot.

In regard to debts of grain or other things which consist in quantity, *quæ in quantitate consistunt*, a distinction is made between liquidation and appreciation. A debt is liquidated when the quantity of a thing which is due is determined, *cum constat quantum debeatur*; it then gives a right to the creditor, who has a title of execution, to seize the property of the debtor, but he cannot sell them until after an appreciation; that is to say, until the amount of what is due be estimated in money; *Ord.* 1667, *t.* 33, *art.* 2.

180. We further divide obligations into obligations of a determinate thing, and obligations of an indeterminate thing of a determinate kind of things, which is called *obligatio generis.*

We shall treat *ex professo* of these obligations *infra*, *chap.* 4, *sect.* 1.

181. Lastly. Obligations are divided into divisible and indivisible obligations, according as the thing due is susceptible of parts, at least in idea, or is not.

We shall treat of these *ex professo infra*, *chap.* 4, *sect.* 2.

§. IV.

Sixth division.

182. Obligations are divided into principal and acceſſory obligations. This diviſion is derived from the order in which the things that are the object of them ſtand in regard to themſelves.

A *principal* obligation is the obligation of what is the principal object of the engagement contracted between the parties.

We call *accessory* obligations, thoſe which are conſequences and dependencies of the principal obligation.

For example. In the contract of ſale of an eſtate, the principal obligation, which the ſeller contracts, is that of delivering the eſtate to the buyer and to warrant and defend his title. *Obligatio præstandi emptori rem habere licere.*

The obligation to give him the title deeds and the neceſſary information in regard to the eſtate, to act with good faith in the execution of the contract, and to take convenient care in the preſervation of the thing ſold, are acceſſory obligations.

Note that theſe terms *principal* and *accessory*, are alſo applied in another ſenſe, as we ſhall ſee *infra*, §. 6.

§. V.

Seventh division.

183. We diſtinguiſh obligations into primitive obligations and ſecondary obligations: and this diviſion is derived from the order in which they are preſumed to be contracted.

The *primitive* obligation, which may alſo be called *principal* obligation, is that which has been contracted originally, principally and ſubſtantively.

The *secondary* obligation is that which is contracted, in caſe of the inexecution of a firſt obligation.

For example. In the contract of ſale, the obligation which the ſeller contracts to deliver and warrant the thing ſold, is the primitive obligation; that to pay damages to the

buyer, if he cannot deliver or warrant to him the thing ſold, is a ſecondary obligation.

184. There are two kinds of ſecondary obligations. The firſt is that of the ſecondary obligations, which are only a natural conſequence of the primitive obligation, which, without the intervention of any particular agreement, ariſe naturally from the inexecution of the primitive obligation, or from delay in the execution of it.

We may adduce, as an example, the obligation of damages, in which is converted naturally and *de jure*, the primitive obligation contracted by a ſeller to deliver and warrant the thing ſold, in caſe the obligation be not performed; likewiſe, the obligation of intereſt, which ariſes from delay in the performance of an obligation to pay a certain ſum of money.

Secondary obligations of the ſecond kind, are thoſe which ariſe from a clauſe inſerted in the contract, by which the party who undertakes ſomething, promiſes to give a certain ſum of money or any other thing, in caſe he does not comply with his engagement.

Theſe are called *penal clauses*, and the obligations which ariſe from them, are called *penal obligations*, and are acceſſory to the primitive and principal obligation, and are contracted in order to inſure the execution of it.

We ſhall treat of them *ex profeſſo infra, chap.* 5.

185. Secondary obligations may further be ſubdivided into two kinds.

There is a kind of ſecondary obligation, into which primitive obligations, that are not executed, are wholly converted. Such is the obligation of damages, of which we have ſpoken before. When a ſeller does not perform his primitive obligation to deliver or warrant the thing ſold, the obligation is wholly converted into the ſecondary obligation to pay damages to the buyer. This ſecondary obligation is ſubſtituted to the primitive, which no longer remains.

There is another kind of ſecondary obligation, which only accedes to the primitive, without deſtroying it, when

the debtor delays the execution of it. Such is the obligation of intereſt which reſults from the delay of paying the principal ſum.

§. VI.

Eighth diviſion.

186. Obligations, conſidered in regard to the perſons who contract them, are divided into principal and acceſſory obligations.

The *principal* obligation in this ſenſe, is that of him who binds himſelf as principal debtor, and not for any other perſon.

The *accessory* obligations are thoſe of perſons who bind themſelves for another, ſuch as the obligations of ſecurities, and of all thoſe who accede to the obligation of another.

We ſhall treat of theſe, *infra, ch.* 6.

§. VII.

Ninth, tenth, eleventh and twelfth diviſions.

187. Obligations, conſidered in regard to the ſecurities and means which the creditor has to procure the payment of them, are divided into obligations privileged and unprivileged, obligations hypothecary and chirographical, obligations with, and without, title of execution, obligations for which the debtor may be perſonally conſtrained, and civil or ordinary obligations.

Privileged obligations are thoſe for which the creditor has a lien, on all or part of the property of the debtor, to be paid in preference to other creditors. See *Introduction au Titre* 20 *de la Coutume d'Orleans, chap.* 2, §. 9, & *Introduction au Titre* 21, §. 16.

Unprivileged obligations are thoſe for which the creditor has no ſuch lien.

188. *Hypothecary* obligations are thoſe which are contracted with an hypothecation or mortgage of the property of the debtor, which is ſuſceptible of hypothecation.

Chirographical obligations are thoſe which are not accompanied by any hypothecation. *Introduction au Titre* 20, *de de la Coutume d'Orleans, chap.* 1.

189. Obligations with *title of execution*, are those for the payment of which the creditor has a right of execution against the debtor; *supra*, *n.* 45.

190. Lastly. Obligations for which the debtor may be *personally constrained*, are those to enforce the payment of which the debtor may be imprisoned 'till he pays. Other obligations, the payment of which cannot be enforced in this manner, are, by contradistinction, termed *civil* and *ordinary* obligations. *Ord.* 1667, *tit.* 34, *& le Commentaire de M. Jousse.*

CHAPTER II.

Of the first division of obligations, into civil and natural obligations.

191. WE have, thus far, sufficiently seen what is the nature of civil obligations; there remains for us to treat in this chapter of natural obligations.

The principles of our jurisprudence differ, in this respect, from those of the civil law.

The Roman jurists called *natural obligation* that which was destitute of action; that is to say, which did not give the person to whom it was contracted, the right of requiring, in law, the payment of it.

Such were all those which arose from simple agreements, that had neither the quality of a contract, nor the form of a stipulation.

These obligations were much favoured; *Quid enim tam congruum fidei humanæ, quam ea quæ inter eos placuerunt servare?* L. 1, ff. *de Pact.* If they were destitute of action, it was only from a reason derived from the policy of the Patricians, who, for their particular interest, had thought proper to make the right of action dependent on formulas, of which they alone, at first, had the knowledge, in order to oblige the Plebeians to resort to them in their affairs and thereby to keep them in dependence. Therefore, except that they were destitute of action, they had all the other effects which

a civil obligation could have. Not only was the payment of what was due by a mere natural obligation valid and not liable to be recalled; but according to the principles of the civil law, I might plead to the action of my creditor, as a set off, what he on his part owed me by a mere natural obligation; L. 6, ff. *de Comp.* According to the same principles, securities could contract a civil obligation, which might accede to an obligation merely natural. L. 16, §. 3, ff. *de Fidej.* And a mere natural obligation might be the subject of a novation to a civil obligation. L. 1, §. 1, *de Novat.*

192. According to the principles of our jurisprudence, which has not admitted the distinction of the civil law between simple pacts and contracts, these natural obligations of the civil law are with us actual civil obligations.

Those which may be called in our law mere natural obligations, are, I. those for which the law denies an action, on account of the disfavor of the cause from which they proceed. Such is the debt due to an innkeeper, for expences incurred in his inn, by an inhabitant of the place. *Coutume de Paris, art.* 128.

II. Those which proceed from the contracts of a person who, having sufficient judgment to contract, is nevertheless, by the municipal law, disabled from contracting. Such is the obligation of a wife who has contracted without being authorised.

193. These obligations which proceed from a cause disapproved by the law, or which have been contracted by a person whom it does not allow to contract, would not have had, by the civil law, even the name of natural obligations; therefore I do not think they ought to have, among us, the effect which the civil law gives to mere natural obligations.

For example. An innkeeper ought not to be permitted to plead to the action of his creditor, what the plaintiff owes him, for expences incurred in his inn; nor the debtor of a wife to plead, as a set off, what she owes him by a contract entered into during her coverture, without her being authorised, unless the contract has turned to her advantage.

194. Likewise, securities do not bind themselves validly

to an innkeeper, for the expences incurred in his inn, by an inhabitant of the place; because the disfavor of the cause of the debt, which causes an action to be denied to the innkeeper, operates equally in regard to the securities as in regard to the principal debtor.

When it is on account only of the quality of the person that the law avoids the obligation, as when a wife binds herself without being authorised, there is more room to doubt whether an action ought to be denied against the securities. For it is from a reason which is personal to the wife, that the law denies an action against her. Nevertheless, it is to be holden, that the obligation of the securities is no more valid than that of the wife. For as the law avoids the obligation of the wife, it cannot exist, except in a moral view. The municipal law disowns and avoids it, and consequently it cannot be a sufficient subject to which other obligations may accede. If, according to the principles of the civil law, securities might accede to a natural obligation, it is because natural obligations were not obligations disapproved of by law and which it avoided. They were only destitute of action. But the civil law decides that securities cannot validly bind themselves for a woman who bound herself contrary to the prohibition of the Velleian Senat. consult. *Quia totam obligationem Senatus improbat*; L. 16, §. 1, ff. *ad sc. Vell.* L. 14, *Cod. dict. tit.* For the same reason, it is to be holden that securities cannot accede to the obligations which a wife contracts, without being authorised, nor to any of the other obligations which are called mere natural obligations on account only of their being forbidden by the municipal law. *Lebrun, Traité de la Communauté, liv.* 2, *ch.* 1. §. 5, *n.* 17.

195. The only effect of the obligation merely natural, is that when the debtor has voluntarily paid, the payment is valid and cannot be recalled; because he had a just cause to pay, that is to say, to discharge his conscience. Therefore it cannot be said that it was done without cause: whence it follows that there is no ground for the actions which are called *condictio sine causa*, and *condictio indebiti*.

Observe, however, that in order that the payment, made

by a woman, of a debt which she has contracted, without the authority of her husband, may be valid, it must be made in her widowhood, or with the authority of her husband, if it be made during the coverture; for then she is no more able to pay without his authority, than to contract.

196. Hitherto, we have spoken of obligations which the disfavor of the cause or the legal inability of the person who contracted them, renders merely natural. A civil obligation, when the debtor has acquired a plea or prescription against the action which results from it, *puta*, by the authority of a judgment or the decisory oath, or by the lapse of the time within which it ought to have been brought, may also be considered as an obligation merely natural, while the plea or prescription remains good and is not removed. See *infra part* 3, *ch.* 8.

197. We ought not to confound the natural obligations of which we have spoken in this chapter, with the imperfect obligations mentioned in the beginning of this treatise. These give to no one a claim against us, even in a moral view. For example. If I have failed to render to my benefactor a service, which gratitude required from me; although he suffers by my neglect of this duty, this does not make him my creditor, even in *foro conscientiæ*. Therefore if he owes me a sum of money, for which I have no action against him, because my claim is barred by the lapse of the time of limitations, he is nevertheless bound, in a moral view, to pay me, without being authorised to oppose to my demand, the loss which he has sustained through my ingratitude, or the advantage which I have reaped from his bounty. On the contrary, the natural obligations of which we have treated in this chapter, give to the person with whom we have contracted them, a claim upon us, not indeed in a legal, but in a moral view. Therefore if I have contracted a debt of one hundred livres for expences in a tavern in the town where I reside, the tavern keeper is really my creditor for this sum, in a moral, although not in a legal view; and if I have a demand against him, which is barred by the limitation, he may conscientiously oppose his tavern bill as a set-off to this demand.

CHAPTER III.

Of the different modifications under which obligations may be contracted.

ARTICLE THE FIRST.

Of suspending conditions and conditional obligations.

198. A CONDITIONAL obligation is that which is suspended on a condition, under which it has been contracted, that has not yet been performed.

In order to understand what a conditional obligation is, we shall see, I. what is a suspending condition, and what are the different kinds of conditions; II. what may make a suspending condition: III. when a condition is presumed to be performed, or so holden. IV. We will treat of the indivisibility of the performance of conditions; V. of the effect of conditions. VI. We shall see whether, if the obligation has been contracted under several conditions, it be necessary that they should all be performed in order that the obligation may have its effect.

§. I.

What a condition is, and what are its different kinds.

199. A condition is the contingency of a future and uncertain event, that may or may not happen, on which the the obligation is made to depend.

200. We divide the conditions on which an obligation may be made to depend, into positive and negative.

A positive condition is that which consists of the contingency of a certain thing which may or may not happen, that it shall happen; as *if I marry*.

A negative condition is that which consists in the contingency of a certain thing which may or may not happen, that it shall not happen; as *if I do not marry*.

201. We further divide conditions into potential, casual and mixed.

A potential condition is that which is in the power of him to whom the obligation is contracted; as when I oblige myself to my neighbour to give him a sum of money, if he

will cut down a tree in his field, which obſtructs my proſpect.

A caſual condition is that which depends on chance, and is not at all in the power of the creditor; ſuch are theſe, *if I have children; if I have no children; If a certain veſſel arrives ſafe in the Indies*, &c.

A mixed condition is that which depends on the concurrence of the will of the creditor and that of a third perſon; as is this, *if you marry my couſin.*

§. II.

What may make a condition which ſuſpends an obligation.

202. In order that a condition may have the effect to ſuſpend an obligation, it is neceſſary, I. that it be the condition of a thing future. An obligation contracted under the condition of a thing paſt or preſent, although unknown by the contracting parties, is not properly a conditional obligation. For example. If, after the drawing of a lottery, and before the account arrives, I have promiſed a perſon to give him a certain ſum if the high prize has fallen to my lot; or if I have promiſed a certain ſum in caſe the Pope be now living; theſe obligations are not conditional: they are either complete and abſolute at firſt, if it appears that I have really the high prize, or the Pope is living; or they are no contracts at all, if it appears that I have not the high prize, or the Pope is dead.

This is ſo decided by the law, 100, ff. *de verb. oblig. Conditio in præteritum non tantum in præsens tempus relata, statim aut perimit obligationem, aut omnino non differt. Adde* L. L. 37, 38, 39, ff. *de R. cred.*

Nevertheleſs, although the thing be actually due, the creditor cannot exact it until the fact be rendered certain, and the debtor notified thereof.

203. It is neceſſary, II. that the condition be of a thing which may or may not happen. The condition of a thing which certainly will happen, is not properly a condition, and does not ſuſpend the obligation; but it merely defers the right of demand, and is equivalent to a time of payment.

It is neceſſary, however, to diſtinguiſh in this reſpect, between obligations which are contracted by deed *inter vivos*, by which we contract as well for ourſelves as for our heirs, and thoſe which ariſe from diſpoſitions made for the benefit of a certain perſon and not his heirs, ſuch as legacies and ſubſtitutions by teſtament or by donations *inter vivos*.

With regard to theſe diſpoſitions, although the contingency which is here the ſubject of a condition, muſt certainly happen; yet if the time when is uncertain, and it is during the life of the legatee or perſon ſubſtituted, it may form a true condition. The reaſon is, that as ſuch diſpoſition is made only to the legatee or perſon ſubſtituted, as the right which reſults therefrom can be acquired only by the ſame perſon, and as the condition which is annexed cannot of conſequence be effectually performed but during the life of the legatee, or perſon ſubſtituted, it ſuffices that it be uncertain whether the condition will happen during his life, though it be certain that it will happen on ſome day, for the diſpoſition to be conditional; ſince it is uncertain whether the legacy will become due. Upon theſe principles it is, that the law 1, §. 2, ff. *de Cond. et dem.* decides that if I have charged my heir with a legacy *when he ſhall die*, this legacy is conditional.—On the contrary, in deeds *inter vivos* by which we contract for ourſelves as well as for our heirs, the contingency of a thing which muſt certainly happen, though it be uncertain when, can never make a condition to ſuſpend an obligation; becauſe the condition of obligations thus contracted, may be as effectually performed after the death of the perſon to whom they were contracted as during his life; as we ſhall ſee, *infra*, *n.* 208, that a debt contracted under the condition of a thing which muſt certainly happen, cannot be uncertain and conſequently not conditional.

204. It is neceſſary, III. in order that a condition be valid and may ſuſpend an obligation, that it be the condition of a thing poſſible, lawful and which may not be contrary to good morals.

The condition of a thing impoſſible, unlawful or contrary to good morals, under which one would promiſe a

thing, renders the contract absolutely null, when the condition is *in faciendo*, and no obligation arises from it. *L.* 1, §. 11, ff. *de Obl. & act.*; *L.* 31, *d. tit.*; *L.* 7, ff. *de Verb. obl.*; as if I had promised you a sum of money under this condition, *if you made a triangle without angles*, or under this, *of going naked through the streets.*

It is otherwise in testaments. Legacies given under the like conditions, are not the less valid, and the condition is regarded as null. This is in favor of last wills; L. 3, ff. *de Cond. & dem.* L. 104, §. 1, ff. *de Legat.* 1.

When the impossible condition is in *non faciendo*, as if I had promised you a sum of money *if you did not stop the course of the sun*, it does not render the obligation which is contracted under it null; this condition has no effect, and the obligation is absolute. L. 7, ff. *de verb. oblig.* But the condition not to do a certain thing which is contrary to law or good morals, may render the obligation null, because it is contrary to justice and good faith to stipulate for a sum of money to refrain from doing that which is forbidden.

205. In order that a condition may be valid and suspend the obligation contracted under it, it is necessary, IV. that it should not destroy the nature of the obligation. Such would be the condition that would make the obligation to depend on the mere and sole will of the person bound; as if I had promised to give a thing if it pleased me, *si voluero.* For the obligation, being *juris vinculum quo necessitate adstringimur* and essentially including a necessity of doing or giving something, nothing is more contrary to its nature than to make it depend on the mere will of him who is supposed to have contracted it; and consequently such a condition does not suspend, but destroys the obligation, which is void for want of binding power, as we have said, *supra*, *n.* 47, & 48. *nulla promissio potest consistere, quæ ex voluntate promittentis statum capit.* L. 108, §. 1, ff. *de verb. oblig.*

It is contrary to the essence of an obligation that it be dependent on the mere and sole will of him who is supposed to have contracted it; but it may depend on the sole will of a third person. Therefore I may validly contract the ob-

ligation to do or give something, if a certain third person consent to it; L. 43, L. 44, *de verb.*

§. III.

When conditions are presumed to be performed.

206. Positive conditions are performed when the contingency, which is the subject of the condition, happens.

When the condition consists in giving or doing a thing, it is necessary for the performance of the condition, that he, whose duty it is made, should give or do the thing in the manner in which it is probable the parties understood it. Therefore, if I have contracted an obligation to you under a condition that you give a sum of money to a certain person, who is a minor; the condition is not performed, when instead of paying this sum to his guardian, you have given it to the minor, who has wasted it; L. 68, ff. *de Solut*: for it is evident that my intention, in imposing on you this condition, was that you should pay the sum to the minor in such a manner as that he might be benefited by it, by placing it in the hands of his guardian, and not by abandoning it to his discretion.

The principle that conditions ought to be performed in the manner in which the parties have probably intended, assists in deciding the question whether conditions ought to be literally performed, *in forma specifica?* Generally they ought to be performed *in forma specifica*; they may nevertheless be performed *per equipollens*, when, *pro subjecta materia*, it appears probable that the parties so intended: and this intention is presumed when he in whose favor the condition is, has no interest in having it performed in one manner more than another.

For example. I have contracted an obligation under this condition, if within a certain time you pay me 100 louis d'ors; the condition will be presumed to be performed on your tendering me 2400 livres in silver, it being indifferent to me to receive that sum in gold or silver; the more so, as in money we consider only the value given it by the Prince, and not the pieces which are the sign of it. *Arg.* L. 1, *in fin.* ff. *de cont. empt.*

207. Conditions being to be performed in the manner the parties underſtood them, it is aſked whether, when the condition conſiſts in ſomething to be done by the creditor, the debtor or a third perſon, it muſt neceſſarily be done by that perſon, or whether it may be done by his heirs or ſome perſon appointed by him? The deciſion of this queſtion depends on the nature of the thing to be done and the intention of the parties. If it be ſomething perſonal, ſomething to be done by a *certain perſon*, rather than a thing ſimply and of itſelf, which the parties had in view; in this caſe, the condition muſt be performed by the perſon himſelf. For example. If I have bound myſelf to my ſervant to give him a certain reward, if he remain ten years in my ſervice, it is evident that his ſervices are perſonal, and that ſuch a condition can be performed by him alone. It is the ſame if I have bound myſelf to the pupil of a celebrated painter to pay him a certain ſum if his maſter made me a certain painting; the object of this condition is perſonal, and muſt be performed by the painter himſelf.

But if the thing, in the condition, to be done by the creditor, the debtor or a third perſon, be not perſonal; if it be ſomething which the parties have conſidered abſtractedly and not in relation to the perſon by whom it was to be done, the condition may not only be performed by that perſon, but alſo by his heirs or other ſucceſſors. For example. I have bound myſelf to pay you a certain ſum of money, *if within a year you cut down the trees on your land, which ſhade my vines*. This condition may be performed by your heirs; for there is nothing perſonal in it. It is evident that I have conſidered the thing ſimply and of itſelf, having no other view than to have the trees removed, it being no matter by whom. Likewiſe, if I have bought your land under a condition that your neighbour ſhould give up a right of way which he had over it, and he dies, the condition is performed on his heirs giving up the right.

208. The condition of contracts by acts *inter vivos* by which we contract as well for ourſelves as for our heirs, may as well be performed after the death of the perſon to whom we bind ourſelves as during his life. *Inſtit. tit. de*

Verb. oblig. § 15. In this, these contracts differ from legacies and the like dispositions, which lapse when he, for whose benefit they were made, dies before the performance of the condition. *L.* 59, ff. *de Cond. & dem.*

The reason of this difference is, that the testator bequeaths only to the person of the legatee; hence it follows that the condition which is not performed till after his death, does not render the legacy due; for it cannot become due to the legatee who is no more, nor to his heirs who were not those to whom the testator intended to bequeath. On the contrary, in acts *inter vivos*, he who stipulates, is presumed to stipulate as well for himself as for his heirs: *Qui paciscitur, sibi hæredique suo paciscitur.* The obligation which results is contracted to him and his heirs; hence the performance of the condition under which the obligation has been contracted, though it happen after his death, must leave the obligation absolute.

Cynus, Bartolus and most of the antient doctors, have maintained that our principle on the performance of conditions in acts *inter vivos*, admits of an exception with regard to potential conditions, that is to say, those which consist of something in the power of him to whom the obligation is contracted. These they pretend cannot be performed after his death. If this decision were confined to potential conditions, consisting of something personal to be done by the creditor, there would be no difficulty in it. It is evident, from what has been already said, that they could not be performed after his death; but it is wrong to say that all potential conditions, indistinctly, may not be performed after the death of the creditor. There is no solid reason on which the opinion of these doctors can be supported. They ground it only on a few texts of law, which are by no means decisive, and which it would require too much time to recite and refute. It will suffice to answer the law 46, ff. *de Verb. Oblig.*, which is the principal foundation of this opinion. It is there said that in a stipulation, these words *cum petiero dabis* are different from the words *si petiero*, and that they include no condition: *admonitionem magis quam conditionem habet hæc stipulatio; et ideo*, adds Ulpian, *Si decesserit

prius quam petiero, non videtur defecisse conditio. From these last words, our doctors argue thus; Ulpian says that when the parties have used these words *cum petiero*, the death of the creditor, happening before the demand, does not prevent the effect of the agreement, because the words *cum petiero* include no condition. Therefore, they conclude, if the parties had used words including a condition, as these *si petiero*, it would have been otherwise; and the death of the creditor happening before the demand, the condition would fail and with it the agreement: then the condition *si petiero* cannot be effectually performed but in the lifetime of the creditor: therefore potential conditions cannot be effectually performed in the lifetime of the creditor. I answer that this last consequence is ill drawn. These doctors, against the rules of logic, argue from a particular proposition to a general one. I admit that the condition *si petiero*, *cannot be performed after the death of the creditor*, because it appears by this condition that it is the personal act of the creditor, that the demand of the creditor himself, which the parties have intended to make a condition; otherwise this condition would have no meaning; but because the condition *si petiero* cannot be performed after the death of the creditor, it does not thence follow that other potential conditions, which include an act that is not personal, cannot be effectually performed after the death of the creditor. This question has been treated of at great length by Covarruvias, *quæst. pract.* 39.

209. When the condition includes a time fixed within which it must be performed, as if I oblige myself to give you a certain sum of money *if a certain vessel returns this year to the ports of France*; the thing must happen within the time fixed; and when the time is expired without this event, the condition is presumed to fail, and the obligation contracted under this condition entirely vanishes.

But if the condition does not include any fixed time within which it must be performed, then it may be performed at any time and it is not presumed to fail until it becomes certain that the thing will not happen.

This rule admits of an exception when the condition

consists of a thing to be done by him to whom I have bound myself under this condition, and is a thing which I am interested in having done; as if I have promised my neighbour to give him a sum of money *if he will cut down a tree which incommodes me*: for in this case I may cite him, to whom I bound my self under this condition, to shew cause why a time should not be fixed by the Judge within which he shall perform the condition, so that on his failure, I may be absolutely discharged from my obligation.

210. Negative conditions either have a time fixed or they have not. When they have a fixed time, they are performed or rather accomplished when this time is expired without the happening of the thing. For example. If I have promised something *if a certain vessel does not return this year to our ports*; the condition will be performed when the year shall expire without the vessel's returning. They may be performed before the expiration of this time when it becomes certain that the thing will not happen.

If the negative condition has no fixed time, it is not holden to be performed until it becomes certain that the thing will not happen. For example. If I have obliged myself to give you something, *if a certain vessel does not arrive safe from the Indies*, the condition of my obligation is not performed until it becomes certain that the vessel will not return, *puta*, by certain news of its wreck.

211. If, however, the condition consists of a thing which is in the power of the debtor, and which is for the interest of him for whose benefit the obligation has been contracted; as if one is obliged to me to give me a certain sum of money if he does not cut down a tree on his land which injures my vines; I think that he who is obliged under this condition may be cited to shew cause why, on his failing to do it within a reasonable time to be fixed by the Judge, he should not be condemned to pay what he is bound to give in case he does not do it; and if he does not do it within the time thus fixed, this negative condition is holden to be performed; and he shall be condemned to pay what he has obliged himself to pay under this condition.

This decision however did not appear to the Roman lawyers to be without difficulty. The two schools were divided in opinion upon the question; L. 15, §. 2, ff. *de verb. oblig.* That of the Sabinians, which I have followed, appears to me more conformable to the spirit and simplicity of our jurisprudence.

212. It is a rule common to all the conditions of obligations that they ought to be holden to be performed, when the debtor who has obliged himself under the condition, has prevented its performance. *Quicunque sub conditione obligatus, curaverit ne conditio existeret, nihilominus obligatur*; L. 85, §. 7, ff. *de Verb. oft. Pro impletâ habetur conditio cum per eum fiat qui, si impleta esset debiturus esset.* L. 81, §. 1, ff. *de Cond. et dem.* This is a consequence of this rule of law. *In omnibus causis pro facto accipitur id in quo per alium mora fit quo minus fiat* L. 39, ff. *de Reg. juris.* We cannot say, however, that it is by the act of the debtor that a condition has not been performed, and that it ought therefore to be holden to be performed, when it was but indirectly and without design of preventing the performance of it, that he opposed an obstacle to it. Therefore Paul says in regard to conditions annexed to legacies, *non omne ab hæredis persona interveniens impedimentum pro expleta conditione cedit.* L. 38, ff. *de statu lib.*

For example. If a testator, to whom I have succeeded, had devised to you a house, *if in a year from his decease you gave to the creditor of Peter a certain sum of money, for which he detained him in prison*; and being myself your creditor to a considerable amount, I have seized your property in order to be paid therefrom; although the seizure which I have made, has disabled you from paying this sum to Peter's creditor and performing the condition annexed to your legacy, I shall not, however, be presumed to have properly prevented, by my own act, the performance of it, and it will not be holden to be performed: for it is but indirectly that I prevented it: the seizure which I made was not made with a design to prevent you from performing the condition; I only intended to exact, by legal means, the sum which you owed me.

Obſerve alſo a difference, in this reſpect, between conditions the performance of which is momentary, and thoſe which can only be performed by lapſe of time: the former are holden to be performed as ſoon as the conditional creditor having offered to perform the condition, has been prevented by the debtor. It is not ſo with the latter. For example. If I had bound myſelf to a labourer under a condition that he do for me ten days work, and I have ſent him back on his offering to work, the condition will be holden to be performed only in part and for a ſingle day; it will not be holden to be entirely performed, until he has offered ten different days. L. 20, §. 5, *dict. tit.*

213. In regard to the rule concerning potential conditions, that they ought to be holden to be performed when he to whom a deceaſed perſon has left ſomething under ſuch a condition, has not had it in his power to perform it; it is a rule which takes place only in the caſe of laſt wills, and which ought not to apply to the conditions of engagements contracted by acts *inter vivos*. For example. If one has bequeathed you a certain ſum, if in a year from his deceaſe you ſet free your negro James, the condition is holden to be performed and the legacy is due, if the death of James, happening ſoon after that of the teſtator, has prevented you from executing and performing the condition; L. 54, §. 2, ff. *de leg.* I. But if one, by an agreement between him and you, has obliged himſelf, under ſuch condition, to give you a certain ſum, I do not think that the ſum would be due you, if the death of the negro ſhould intervene and prevent the performance of the condition. The reaſon of this difference is, that laſt wills are ſuſceptible of a more liberal interpretation. On the contrary, contracts ought only to be extended *quantum ſonant*; and the interpretation in caſes of doubt is always made againſt him to whom the obligation is contracted. *Ambiguitas contra ſtipulatorem eſt.* L. 26, ff. *de R. dub.*; becauſe he ought to impute to himſelf the blame, if the act is not ſufficiently explicit, having had it in his power at the time to render it ſo; L. 39, ff. *de Pact.* L. 99, *de Verb. oblig.* Therefore, according to this principle, when by an act *inter vivos*, one is obliged to me under this condition, that I ſet

my negro free, in the doubt whether the obligation be binding in caſe I could not ſet him free, the interpretation ſhould be made againſt me; and I ſhall not be able to require what was promiſed me under this condition, although the death of the negro, happening before I could ſet him free, prevented me from performing the condition. This deciſion would take place even when I had made ſome preparation for this purpoſe; as if I had ſent for the negro from a diſtant plantation, where he was in order to ſet him free before the judge, where I reſide, and he had died on the way; I could not require what has been promiſed me under this condition; I can only demand to be indemnified for my expences in ſending for him.

214. It is the ſame as to the rule which applies to mixed conditions. If one has promiſed me a certain ſum if I would marry his couſin, I do not think that the ſum would be due if I ſhould offer to marry her and ſhe ſhould refuſe; altho' if one had left me a legacy under ſuch condition, the condition, would be holden to be performed. L. 31, ff. *de Cond. & dem.*

§. IV.

Of the indiviſibility of the performance of conditions.

215. The performance of conditions is indiviſible even when that which makes the object of the condition is ſomething diviſible. For example. If one has bequeathed to me a certain eſtate, on condition that I give a certain ſum of money to his heir; or if one by a tranſaction obliges himſelf to abandon to me an eſtate in litigation between us, if I would give him, within a certain time, a certain ſum: although this condition has for its object a thing diviſible, nothing being more ſo than a ſum of money, nevertheleſs the performance of this condition is indiviſible, in this ſenſe, that the legacy which has been given me under this condition, and the obligation which has been contracted to me under this condition, will be in ſuſpenſe till the performance of the whole condition, and the partial performance will not give a partial effect to the legacy or obligation. L. 28. L. 56, ff. *de Cond. & dem.*

Therefore if one left a legacy to Peter, in case he gave to his heir 10,000 livres, and Peter dies after having given only 5,000, the legacy becomes lapsed as to the whole; *d.* L. 56; and the heir of Peter can only recall his 5,000 livres *condictione sine causa*; unless, however, the heir of the testator chooses to pay half of the legacy; for it is in favor of the heir of the testator, debtor of the legacy, that the condition is regarded as indivisible; *Molin. tract. de div. & ind. sec.* 3, *n.* 457.

It would be the same if the legacy had been given to Peter, or, on his decease, to his children, and Peter dying first, one of his children, succeeding to the legacy, had paid to the heir of the testator his part of the 10,000 livres: the condition would not in anywise be holden to be performed; and he could demand nothing until the residue had been paid. *d.* L. 56.

It would be otherwise if the legacy had been at first given to two legatees under this condition. The testator, having at first imposed the condition upon two legatees, is presumed to have divided it between them; *d.* L. 56.

216. Dumoulin decides for the indivisibility of the condition in the following instance. Four heirs of a debtor have been condemned to pay a certain sum, with a stay of two years for the payment, *if they give security in one month*. Dumoulin maintains that the three heirs who have given security on their part in the month, cannot avail themselves of the stay, if their co-heir has not done the same on his part. The reason is that the creditor, in this instance, is the party most to be favored, since it is he who suffers inconvenience from the time given to his debtors; whence it follows that the condition under which the time is granted by the judge, ought to be construed favorably to him and with strictness against the debtor. *Molin. tract. de div. & ind. n.* 3, *n.* 534, *& seq.* If the fourth heir, instead of giving security for his part, has paid it, there is no doubt that the three who who have given security, each for his part, ought to have the benefit of the stay granted by the judgment: the creditor in this case, has security for all that is due. *Molin. ibid, n.* 542.

217. The condition annexed to a legacy is divided, when the legacy has not effect but in part. For example: If one has bequeathed to me a thing under a condition to give to some person a certain sum, and this legacy is reduced to a third part because the rest did not belong to the testator, who thought however that he was proprietor of the whole: not only would I not be holden to give more than a third of this sum to perform the condition; but if I had already given the whole, I might recall the surplus. See L. 43; L. 44, §. 2, ff. *de Cond. et dem.*

§. V.

Of the effect of conditions.

218. The effect of a condition is to suspend the obligation until the condition be performed or be so holden; until, then, there is nothing due, but there is only an expectation, that it will be due. *Pendente conditione nondum debetur, sed spes est debitum iri.* Therefore payment made through error before the condition is performed is subject to be recalled *condictione indebiti.* L. 16, ff. *de Cond. ind.*

219. If the thing which made the object of the condition, al obligation, entirely perishes before the performance of the condition, the condition would be ineffectually performed afterwards; for the performance of the condition cannot confirm the obligation of what no longer exists, there being no obligation without a thing which may be the subject of it. If the thing exists at the time of the performance of the condition, the performance of the condition has this effect that the thing is due in the state it may be in: the creditor profits by the augmentation intervening, if the thing is augmented; and he suffers by the loss and diminution which may intervene, provided it does not proceed from the fault of the debtor. L. 8, ff. *de Per. et comm. rei vend.*

220. This performance of the condition has a retrospective effect to the time when the engagement was contracted; and the right that results from the engagement is presumed to have been acquired to him with whom the contract was made, from the making of the contract. L. 18, L. 144, §. 1, ff. *de Reg. Jur.*

Hence if the creditor dies before the performance of the condition, although he had yet no complete right, but a mere poſſibility, yet if the condition be performed after his death, he will be preſumed to have tranſmitted to his heirs the right reſulting from the engagement contracted towards him; becauſe by means of the retroſpective effect of the condition, the right will be preſumed to have been acquired from the time of the contract, and conſequently to have been tranſmitted to his heirs.

It is otherwiſe of conditions annexed to legacies. The reaſon of this diſtinction is, that the legacy being only made to the perſon of the legatee, the condition can only be performed for his benefit: while he who contracts being preſumed to contract for himſelf and his heirs, the condition may be performed for the benefit of his heirs, even after the death of the creditor. *Supra*, *n.* 208. See *Cujas*, *ad. d.* L. 18.

221. It is alſo a conſequence of the retroſpective effect of conditions, that if the conditional engagement has been contracted by an act which produces an hypothecation, the hypothecation will be preſumed to be acquired from the day of the contract, although the condition was not performed till a long time after.

222. Although the conditional creditor has no right 'till the performance of the condition, yet he is admitted to do all that may be neceſſary or proper for the preſervation of the right which he expects one day to have. For example. He may oppoſe a decree for the ſale of the land, which would be hypothecated to his claim, if the condition, on which it depends, were performed. He will even be conſidered as a creditor for this conditional claim. But he ſhall not receive the ſum for which he is admitted to be a creditor, 'till after the performance of the condition. The abſolute creditor, to whom the funds will fall, in caſe the admiſſion of the conditional creditor be confirmed, by the performance of the condition, will be paid in his ſtead, on giving him ſecurity to refund, in caſe the condition be performed.

§. VI.

Whether, when an obligation has been contracted under several conditions, it be necessary that they be all performed.

223. This queſtion is decided by a diſtinction. When ſeveral conditions are put with a disjunctive particle, as when I have bound myſelf to ſomething towards you, *if a certain veſſel arrives ſafe, or if I am appointed to a certain office;* it ſuffices that one of the conditions be performed to render the obligation abſolute. But if they are put with a conjunctive particle, as when it is ſaid, *if a certain veſſel arrives, and if I am appointed to a certain office*, it is neceſſary that both the conditions be performed; and if either fail, the obligation vaniſhes. L. 129, ff. *de Verb oblig.*

Note, however, that in teſtaments, and even in contracts, by acts *inter vivos*, disjunctive particles are taken in a copulative ſenſe, when it is evident that they were ſo taken by the teſtator or the contracting parties; as when a father or other relation bequeaths his eſtate over, after the death of his ſon or other relation, *if he dies without iſſue, or without having diſpoſed*, &c. It is evident that in this ſubſtitution, by teſtament or by a donation *inter vivos*, the disjunctive particle *or* was underſtood by the teſtator or donor in a copulative ſenſe, and that the ſubſtitution is not to take place, but on the performance of both conditions. *Facit*, L. 6, *cod. inſt. & ſubſt.*

ARTICLE II.

Of reſolutive conditions and of obligations diſſoluble under a certain condition, and of thoſe the duration of which is limited to a certain period.

224. Reſolutive conditions are thoſe which are put, not to ſuſpend the obligation, till the performance of them, but to make it ceaſe when they are performed. An obligation contracted under a reſolutive condition is perfect, therefore, at the moment of the contract; the creditor may demand the payment of it. But if, before it be diſcharged or the debtor has been put in arrear to diſcharge it, the condition, under which it has been agreed it ſhould be diſſolved, happens, the obligation will ceaſe.

This difference between resolutive conditions and suspending conditions of which we have spoken in the preceding article, will be illustrated by an example. You have lent to Peter, by my order, 1000 crowns, and I have bound myself to pay this sum to you, if a certain vessel, in which I have a large interest, arrives safe from the Indies. This condition is a suspending condition, which suspends my obligation: I am not yet your debtor, and will not become such, 'till it be performed by the return of the vessel. But if I have bound myself to you *'till the return of the vessel*, that is, to say, under a condition that my obligation shall not continue longer than 'till the return of the vessel, the condition of the return of the vessel is only a resolutive condition, which does not prevent my obligation from being perfect from the time of the contract, and consequently, you may demand of me the payment. The whole effect of this condition is, that if the vessel arrives before I discharge the obligation or before I have been put in arrear to discharge it, the performance of the condition will cause the obligation to cease.

225. As the duration of an obligation may be limited to a certain event, so it may be limited to a certain time. For example. If I became security to you for Peter for three years, I shall be discharged from my obligation when this time will be expired.

226. Note, however, that when the debtor, before the expiration of the time, or before the performance of the condition, which was to dissolve the obligation, has been put in arrear by a judicial interpellation, his obligation can no longer be dissolved in this manner. L. 59, §. 5, ff. *mand.* The reason of this is evident; the creditor cannot suffer from the unjust delay of the debtor in the discharge of his obligation whilst it subsisted, and the debtor ought not to avail himself of his own wrong.

See *infra*, *Part* 3, *ch.* 7, *art.* 2; what is there said of the manner in which obligations are dissolved by a resolutive condition, or by the expiration of the resolutive time.

Article III.

Of the time of payment.

227. An obligation may be contracted with a time of payment or without. When it is contracted without a time of payment, the creditor may demand the payment of it immediately: when it includes a time of payment, he cannot demand it 'till the expiration of that time.

§. I.

What a time of payment is, and what are its different kinds.

228. The time of payment is a ſpace of time granted to the debtor to diſcharge himſelf from his obligation.

There is an expreſs time of payment which reſults from a poſitive agreement, as when I have bound myſelf to pay you a certain ſum of money within a certain time. There is another which reſults impliedly from the nature of the things which are the object of the engagement, or from the place where it is agreed that the thing ſhall be paid. For example. If a maſon bound himſelf to build me a houſe, I ought to wait the convenient ſeaſon to require from him that he perform his engagement. If one has bound himſelf in Orleans to convey a thing to my correſpondent at Rome, the engagement impliedly includes the time which is neceſſary to ſend it to Rome.

229. The time of payment is either a matter of right or of favor. It is a matter of right when it makes part of the agreement which produced the engagement; being included in it expreſsly, or at leaſt impliedly. It is a matter of favor when it makes no part of the agreement, *puta*, when it is granted ſince, by the Prince or by the Judge, at the prayer of the debtor.

§. II.

Of the effect of the time of payment, and in what it differs from the condition.

230. The time of payment differs from the condition, in this, that the condition ſuſpends the engagement which the agreement is to produce: the time of payment on the con-

trary does not ſuſpend the engagement, it only delays the execution of it. He who has promiſed under a condition is no debtor, 'till the condition be performed; there is only a probability of his becoming ſo. Hence it follows, that if thro' error he were to pay before the condition was performed, he might reclaim what he has paid as a thing not due, as we have ſeen in the preceding article.

On the contrary, he who owes and has a time of payment yet to come, is a real debtor, and were he to pay before the time, he could not reclaim, becauſe he would have paid what he really owed; but though he is a debtor, the creditor cannot, till the time of payment arrives, exact from him what he owes.

Sometimes, however, the verb *to owe* is taken more ſtrictly for what is actually demandable, and in this ſenſe they ſay, "*he, who has time, does not owe.*"

231. The time of payment delays the right to demand the debt, till it be entirely elapſed. Thus if I have promiſed to pay a ſum of money this year, it will not be demandable 'till the laſt day of the year. For this laſt day makes part of the time of payment; L. 42, ff. *de verb. oblig.*

232. This effect of the time of payment, to prevent the creditor from exacting the debt, 'till it be expired, is common to the time of payment, of right, and to the time of payment, of favor.

The time of payment, of right, has another effect which is peculiar to it, viz. that it prevents the debt from being oppoſed as a ſet-off, till it be expired.

For example. I lent you on the firſt of January, 1755, 1000 crowns, which you bound yourſelf to repay me on the firſt of January 1756; ſince that time you became heir to my creditor, to whom I owed the ſame ſum without a time of payment. You demand payment of this ſum in July 1755. I cannot oppoſe to your claim, as a ſet off, the 1000 crowns you owe me, payable the firſt of January, 1756. For the ſet off being a payment, this would be, on my part, to compel you to pay me before the time of payment, which is contra-

ty to the tenor of the agreement which was made between us.

It is otherwiſe of the time of payment, of favor: this will prevent the creditor from proſecuting, but it does not include a right to oppoſe it as a ſet-off. For example. I lent you on the firſt of January, 1755, 1000 crowns, payable on demand, and you have obtained from the Prince or Judge, time of payment 'till the firſt of January, 1756. If, becauſe you have become heir to a perſon to whom I owe a like ſum, you were to demand it of me in July, 1755, the time of payment, of favour, which has been granted to you, would not prevent my oppoſing, as a ſet off, the ſum of 1000 crowns, which you owe me. This time of payment, of favor, has only the effect to ſtay the rigorous purſuit of the creditor, and not to prevent or delay a ſet off. *Aliud eſt enim diem obligationis non venisse, aliud humanitatis gratia tempus indulgeri ſolutionis.* L. 16, §. 1, ff. *de Compens.*

233. There remains for us to obſerve, as to the effect of the time of payment, that as it is preſumed to be given in favor of the debtor, L. 17, ff. *de R. J.*, the debtor may well refuſe to pay 'till the expiration of the time; but the creditor cannot refuſe to receive, if the debtor deſires to pay; L. 70, *de ſolut.*; L. 17, *de Reg. Jur.*; unleſs it be apparent, from circumſtances, that the time of payment was ſtipulated as well in favor of the creditor as in favor of the debtor.

The time of payment mentioned in a bill of exchange, is reputed to have been inſerted as well in favor of the creditor, owner of the bill, as in favor of the debtor. *Declaration of the 28th of November*, 1712.

§. III.

Of the cases in which the debt may be demanded before the time of payment.

234. The time granted by the creditor to the debtor is preſumed to have for its foundation the creditor's confidence in the debtor's ſolvency. When, therefore, this foundation fails, the effect of the time of payment ceaſes.

235. Hence it follows, 1. that when the debtor becomes

bankrupt, and his property is divided among his creditors, a creditor may receive his dividend, though the time of payment has not arrived. This is another difference between the time of payment and the condition. For the conditional creditor in such case has no right to receive a dividend, but only to require that the other creditors may give security to refund, in case, by the happening of the contingency on which the condition depends, his debt becomes absolute.

236. Note, that if, of several debtors *in solidum*, some happen to become bankrupts, the creditor may well demand the debt from them before the time of payment; but he cannot demand it from those who remain solvent. A solvent debtor ought to have the full benefit of his time of payment, neither is he to be required to give any security on account of the failure of his bankrupt co-debtors. It was thus determined in a case, decided the 29th of February, 1592, reported by Anne Robert, iv. 6. The reason is, that the debtor who remains solvent, cannot, without some act of his, be bound to more than he at first intended to engage. He therefore cannot be compelled to give a security which he did not bind himself to give. The failure of his creditors being their act, not his, cannot prejudice him, according to the rule, *Nemo ex alterius facto prægravari debet.*

Hence it follows, II. that the hypothecary creditor who has made opposition to the sale of an estate that was hypothecated to him, and who finds that there are prior hypothecations under which it must be sold, may demand the payment of what is due him out of the monies arising from the sale, though the time of payment has not yet arrived, because his right of hypothecation, which occasioned his confidence in the debtor to give him a time of payment, failing, the effect of the time of payment given ought to cease also.

§. IV.

Of the time added to the condition.

237. Agreements include sometimes a condition and a time for its performance. In such case, it is necessary to examine whether the time is put to the condition alone or to

the payment alſo. In the firſt caſe when the condition is performed, it is not neceſſary to wait for the expiration of the time in order to demand the debt. For example. If it be ſaid, *if I marry within three years, you will pay me* 100 *livres.* On my marrying in ſix months after, I ſhall have a right immediately to demand the 100 livres, without waiting for the expiration of the three years. Likewiſe, if it had been agreed that you ſhould pay me a certain ſum in caſe I did not go to Italy before the month of May, the ſum will become due as ſoon as it ſhall be certain, by my death, that I ſhall not go to Italy, L. 10, ff. *de Verb. oblig.*; without there being any neceſſity to wait till the month of May; becauſe the time is put to the condition alone and not to the payment. But if, on the contrary, it has been ſaid, *if I marry between the preſent time and the firſt of January* 1758, *then you will pay me* 100 *livres*; the word *then* ſhews that the time is put to the payment as well as to the condition: therefore, tho' I perform the condition by marrying, I ſhall not be able to demand the ſum promiſed, till the expiration of the time; L. 4, §. 1, ff. *Cond. & dem.* See *Pand. Inſt. tit. de Verb. oblig. n. 111; & tit. de Cond. de dem. n.* 10 & 11.

ARTICLE IV.

Of the place of payment.

238. When the agreement includes a certain place where the payment is to be made, the place is preſumed to have been agreed upon for the advantage of the creditor as well as of the debtor; therefore the debtor cannot compel the creditor to receive elſewhere. *Is qui certo loco dare promiſit, nullo alio loco quam in quo promiſit, ſolvere invito ſtipulatore poteſt*; L. 9, ff. *de eo quod certo loco.*

But according to the principles of the civil law, the creditor might demand payment from the debtor in another place than the one agreed upon; *puta*, at the place of reſidence of the debtor, or at the place where the contract was made, when he found him there, each allowing to the other a compenſation for the inconvenience ſuffered from the payment not being made at the place agreed upon. This was the ſubject of the action *de eo quod certo loco.* See *d. tit.* ff.

239. This action is not in use among us, and the creditor can no more compel the debtor to pay at another place than the one agreed upon, than the debtor can compel the creditor to receive elsewhere. Automne, *d. tit.* says: *Hic titulus non servatur in Gallia.*

Hence it follows that when the creditor does not reside in the place at which the payment is to be made, he ought to appoint where, in that place, the payment may be made; otherwise the debtor cannot be put in arrear. This appointment ought to be notified to the debtor, either by the agreement or by a judicial summons. For want of such appointment by the creditor, the debtor, when he wishes to pay, may summon him judicially to make the appointment; otherwise he will be authorised to consign at the place. See *infra*, n. 536.

240. The debtor cannot, indeed, be compelled to pay elsewhere than at the place designated; but on his failing to do so at this place, his property may be seized, if the obligation be with title of execution, wherever it may be found, and even if it be one for which the debtor may be constrained by his person, he may be imprisoned wherever he may be found; it was so adjudged in a case reported by Mornac, *ad.* L. 1, ff. *de eo quod certo loco.*

241. It remains to be observed that if the agreement includes two different places of payment, put with a conjunctive particle, the payment must be made, one half in one, and the rest in the other. L. 2, §. 4, ff. *de eo quod certo loco*.... If they are put with a disjunctive particle, the payment may be made, of the whole, in either place, at the election of the debtor. *Generaliter definit Scævola petitorem habere electionem ubi petat, reum ubi solvat, scilicet ante petitionem*; L. 2, §. 3, ff. *d. t.* See *infra*, *part* 3, *chap.* 1, *art.* 5.

ARTICLE V.

Obligations contrasted with a clause giving liberty to pay to a person indicated, or to pay a certain thing instead of the thing due.

242. Regularly the payment of a debt cannot be made to any person other than the creditor, without his consent.

It is then an accidental quality of the obligation, when it is contracted with the liberty of paying to another perſon indicated in the agreement. See *infra*, *part* 3, *ch.* 1, *art.* 2, §. 4.

243. Nor can one regularly pay to the creditor, without his conſent, another thing than that which is due, and which makes the object of the obligation. Nevertheleſs obligations are ſometimes contracted with the liberty of paying another thing inſtead of that which is due; as when I farm my vineyard for 300 livres a year, which the tenant ſhall be at liberty to pay me in wine of his vintage, at the price it may be ſold at in the neighbourhood. Although it is a ſum of 300 livres which is due me by my tenant, yet he may pay me wine inſtead of it.

Likewiſe, if one has deviſed to me his houſe, if his heir does not chooſe to pay me three thouſand livres in its ſtead; the heir, in accepting the inheritance, contracts towards me *ex quasi contractu*, the obligation to give me the teſtator's houſe, but with the liberty of paying me three thouſand livres in its ſtead.

244. We ought not to confound theſe obligations with obligations under an alternative, of which we ſhall ſpeak in the following article. In theſe, all the things promiſed under an alternative, are due; but in the obligations with liberty to pay another thing than that which makes the object of the obligation, there is but one thing due. That which the debtor has the liberty to pay is not due; it is not *in obligatione*, but only *in facultate solutionis*; as in the example of the deviſe of a houſe, with the liberty of paying three thouſand livres in the ſtead of it, there is nothing due but the houſe.

Hence it follows, I. that the creditor has no right to demand any thing but the houſe, and not the three thouſand livres, although the debtor may, before and after a demand made of the houſe, pay the three thouſand livres.

II. That if the houſe be deſtroyed by an earthquake, the debtor will be entirely diſcharged.

III. That the claim reſulting from ſuch a deviſe is of

the nature of real property, even if the debtor were to make his election to pay me the three thousand livres in order to discharge himself; for the nature of a claim follows that of the thing due, not of that which may be paid in its stead. Therefore if the devise had been made by my grandfather, whilst I was in a community of goods with my wife, I would have, as my separate property, the three thousand livres paid by the heir during the community, this sum being the redemption of the claim of a house and consequently of a claim of real property, which proceeding from the devise made to me by my grandfather, is my separate property.

ARTICLE VI.

Of obligations under an alternative.

245. An obligation under an alternative, is that by which a person binds himself to give or do several things, on condition that the payment of one of them shall discharge him as to all; as if I bind myself to give you a certain horse or twenty crowns, or if I bind myself to build you a house or pay you a hundred pistoles, &c.

When one has bound himself to pay two different sums of money put with a disjunctive particle, the obligation is not therefore in the alternative, and he is debtor only of the smallest; *Si ita stipulatus fuero, decem aut quinque duri spondes, quinque debentur;* L. 12, ff. *de Verb. oblig.*

246. In order that an obligation may be under an alternative, it is necessary that two or more things be promised and put with a disjunctive particle. When several things have been promised with a conjunctive, there are as many obligations as there are things; L. 29, ff. *de Verb. oblig.*; and the debtor is discharged only by the payment of them all: but when they have been promised under an alternative, though they are all due, there is but one obligation. L. 27, ff. *de Leg.* 2, which may be discharged by the payment of either of the things so promised; *Alterius solutio totam obligationem interimit. Adde Gloss. ad* L. 25, ff. *de Pecun. const.*

247. The debtor has the choice of the thing which he would pay; L. 25, ff. *de Contr. empt.*; unless it has been a-

greed that the creditor ſhould have it. This is a conſequence of the rule of interpretation mentioned *ſupra*, n. 97.

The debtor may indeed pay which of the things he pleaſes; but he cannot pay part of one and part of another. For example. If he has bound himſelf to give me ſixty livres or twenty buſhels of grain; twenty crowns or a certain acre of land: he cannot give me the half of the money and half of the land or grain; but he muſt give me either all the money, or all the land or grain. So when the creditor has the choice, he cannot require part of the one and part of the other. L. 8, §. 1, ff. *de Leg.* 1.

In rents and annuities which are under an alternative, as a rent of thirty livres or a meaſure of grain yearly, the debtor may chooſe every year which of the two things to pay; although he may have paid the thirty livres for the firſt year, he may elect to pay the meaſure of grain the next, and *vice versa*; L. 21, §. 6, ff. *de Act. empt.*

248. From the principle we have eſtabliſhed, that the things compriſed in an obligation which is under an alternative, are all due, without any one of them, however, being due determinately, it follows, I. that, in order that the demand of the creditor may be regular, he ought to demand all the things, not indeed jointly, but in the alternative under which they are due him. If he demanded only one of the things, his demand would not be regular, becauſe neither of them is determinately due; but all are due in an alternative. If, however, by a ſpecial clauſe, the choice was given to the creditor, he might demand one of them alone.

249. II. That an obligation is not under an alternative when one of the two things that were promiſed was not ſuſceptible of the obligation contracted; but in this caſe the obligation is a determinate one of the thing which was ſuſceptible of it. It is on this ground, that it is decided in the law 72, §. 4, ff. *de solut.* that if one has promiſed under an alternative two things, one of which belonged to me already, he is not at liberty to pay this to me inſtead of the other, though it has ſince ceaſed to belong to me; becauſe, as this thing was not, at the time of the contract, ſuſceptible

of the obligation which was contracted towards me, *cum res sua nemini deberi possit*, it is only the other that is due.

250. It follows from our principle, III. that when several things are due under an alternative, the extinction of one of them does not extinguish the obligation; for all being due, the obligation exists in those which remain and they cannot cease to be due but by the payment of one of them.

For the same reason, if the creditor of those things, being so *ex causa lucrativa*, became owner of one of them *ex alia causa lucrativa*, the obligation, which cannot exist with regard to the thing of which he is become owner, exists as to the others. L. 16 *de Verb. obl.*

When one of two things due under an alternative has perished, is the debtor allowed to offer the price of the thing which perished, in order to avoid paying that which remains? No; for the thing which has perished, existing no more, is no longer due; that which remains is the only one due, and consequently the only one which may be paid; L. 2, §. 3, v. *Qui Stichum*, ff. *de eo quod certo loco.* L. 34, §. 6, ff. *de Contr. empt.*; L. 95, §. 1, ff. *de Solut.* The law 47, §. 3, ff. *de Leg.* 1, seems contrary to this position. It is there said, that two slaves being bequeathed under an alternative, and one of them being dead, the heir was holden to give the one which remained; and it was added, "or perhaps the price of "the one who was dead," *fortassis vel mortui pretium.* But this decision, as Dumoulin very properly remarks, *Tract. de Div. & individ. part.* 2, *n.* 150, must be confined to the cases, in which circumstances would shew that such was the testator's intention, which the word *fortassis* indicates.

251. It is immaterial whether one of the things included in the alternative, perished without the act or fault of the debtor and before any delay on his part, or whether it perished by his fault or since his delay. In either case, that which remains is the only thing that is due, and the debtor is not admitted to pay the price of the one which has ceased to exist; *d.* L. 95, §. ff. *de Solut. Nec obstat* that when a thing has perished by the fault of the debtor or since his ar-

rear, it is presumed to continue to be due in the price which the debtor, in this case, owes in the room of it. L. 82, §. 1, *de Verb. obl. & passim.* The answer is, that that which has been established only in favor of the creditor in the case of the obligation of a thing determinately due, cannot be opposed to the creditor in the case of the obligation under an alternative; the fault or delay of the debtor ought not to be prejudicial to the creditor. They would be prejudicial to him and alter his situation, if the debtor who can still perform his obligation, in the one of the two things which remains, were received to offer the price of that which has perished; a price which the creditor would not be bound to receive, were they both remaining.

252. When both the things have perished successively, by the fault of the debtor or since his arrear, the debtor, though he had the choice to give which of the two he pleased, has not in the same manner the choice to give the price of that one of the two which he pleases; for by the extinction of the first he has become debtor of the second: he therefore owes determinately the price of that which perished last.

When the first has perished by his fault, and that which remained has also perished, but not by his fault, and before he has been put in arrear, although, *subtilitate legis*, it would seem that he ought to be absolutely discharged as to both; yet equity requires that he be chargeable in this case with the price of the first which perished by his fault, *d.* L. 95, §. 1.

253. When, by the agreement, the choice has been given to the creditor, he has the choice of the thing that remains or the price of the one which perished by the fault of the debtor: otherwise this fault would be prejudicial to him, if the first, which perished, was the most valuable. *Molin. Tract. de div. & in div. p.* 2, *n.* 152, 154.

254. It follows from our principle, IV. that as long as the things due under an alternative exist, the obligation remains indeterminate and uncertain; and it becomes determinate to one of the things comprised in the obligation,

only by the payment of it. Hence it follows that when real property and a perſonal thing are due under an alternative, the nature of this claim is in ſuſpenſe. If the debtor gives the real property, the claim will he reputed to have been a claim of real property; if he gives the perſonal thing it will be reputed to have been a perſonal claim. In this the obligation under an alternative differs from the determinate obligation of a certain thing with liberty to give another in the ſtead of it. See *ſupra*, *n.* 244, *in fine.*

255. A teſtator having bequeathed to one a certain picture determinately, has ſince, by a codicil, altered this diſpoſition by bequeathing to the ſame perſon this picture *or a ſum of* 500 *livres.* This codicil not being found at the death of the teſtator, the heir delivered to the legatee the picture, which he thought was due determinately. Afterwards the codicil is diſcovered, and the heir, finding that he owed the picture only under the alternative of 500 livres, cites the legatee to reſtore it on being paid the money. Is he well grounded? The two ſchools among the Romans were divided on this queſtion. Celſus, of the ſchool of the Proculeians, decides the queſtion, in law 19, ff. *de Leg.* 2. in the negative. His reaſon is, that the things included in an obligation under an alternative, being all due, the payment which has been made to the legatee of the picture bequeathed, is the payment of a thing due, and conſequently is a valid payment not liable to be reclaimed.

On the contrary, Julian, who was of the Sabinian ſchool, decides in the law 32, §. *fin.* ff. *de Cond. indeb.* that there is room to reclaim, when a debtor has paid a thing which he thought, through miſtake, to be determinately due, though he was debtor only of an indeterminate thing of a certain kind, or was debtor of it only under the alternative of another thing.

The reaſon on which this deciſion is grounded, is that the innocent error in which the debtor was as to the quality of his obligation, ought not to be prejudicial to him, nor add to his obligation, by depriving him of the choice he had to pay the money inſtead of the picture. As to the reaſon

given for the contrary opinion, it is obviated by saying that there is room to reclaim, *condictio indebiti*, not only when one has paid what was in no manner due, but also when one had paid more than was due. L. 1, §. 1, *Cod. de cond. ind. & passim*; which is to be estimated *non solum quantitate debiti, sed & causa. Inst. tit. de act.* §. 34, *vers. Huic autem.* Therefore, in the present case, he who has paid a thing as due determinately, whilst he owed it only under the alternative of another thing, has paid more than he owed: and this payment ought to be liable to be reclaimed by the debtor on his offering to pay the other thing which he had the right to pay instead of that which he has paid. This last opinion is much more equitable than the first; it restores to each what belongs to him. Therefore Dumoulin decides very properly, *Tract. de div. & ind. p.* 2, *n.* 135, *& seq.*; that it ought to be followed.

256. Dumoulin, *n.* 139. *& seq.*, adds to this decision a modification which is, that when the creditor has not led the debtor into error, and he has received *bona fide*, the claim of the debtor is only to be admitted, when the creditor will not be injured by it and when he will be placed in the situation he was in before the payment. The reason is that the action is grounded only on a principle of equity: *Hæc condictio ex bono & æquo introducta*, L. 66, ff. *de condictione indeb.* It is grounded only on the rule of equity which does not permit any one to benefit himself at the expence of another. Therefore it can be allowed only for the amount of the advantage gained by him who has received. L. 65, §. 7 & 8, ff. *d. tit.* According to these principles it is to be holden that if, in the above case, the legatee had sold *bona fide* the thing which had been delivered to him, the heir cannot claim any thing more than the excess beyond the sum which he had a right to pay instead of it.

According to the same principles, if the debtor has paid to the creditor a sum of money which he thought was due determinately; although he owed it only under the alternative of another thing, he ought not easily to be admitted to reclaim the money on offering to give the other thing, when

the creditor has employed the money, and there is not a great disproportion of value between the sum received and the other thing.

257. There is another question on which the schools were divided. He who owed two things under an alternative, being deceived by the copy of the notary who had written *and* instead of *or*, as it was in the original, has paid the two at the same time; he has since discovered that he owed but one of the two, at his choice. There is no doubt that he may recall one of them; but may he recall which of them he pleases? Celsus, cited by Ulpian in law 26, §. 13, *in fin. ff. de Cond. ind.*, thought that the creditor had a right in this case to retain which he pleased. Julian, on the contrary, as related by Justinian in law *penult. Cod. hoc titulo*, thought the debtor had a right to recall which of the two he might choose. The opinion of Celsus was probably grounded on this reasoning: the two things which are comprised under the alternative being both due, the debtor who has paid them both cannot say that either of these two things determinately was not due. He cannot then reclaim either of them determinately as due; he has only a right to reclaim one of the two indeterminately, as having paid more than he owed, in paying both whilst he owed but one of them. The creditor becoming in his turn debtor for the restitution which is due of one of the things, it is to him, in quality of debtor, that ought to belong the choice of paying back which of them he pleases. This reasoning, on which the opinion of Celsus is founded, is a mere subtilty.

The opinion of Julian is founded in equity. The action *condictio indebiti* is a kind of restitution *in totum* which equity grants against an erroneous payment. It is of the nature of all restitutions against an act, that the parties be restored to the same condition in which they were before. Hence it follows that the debtor who has paid the two things, not knowing that he was bound only to pay the one which he pleased, ought to be restored by this action to the right he had before the payment, to pay the one only which he chose, and consequently to reclaim with the same choice. This last opinion, as the most equitable, has been embraced by Pa-

pinian and finally confirmed by the conſtitution of Juſtinian; L. *penult. Cod. d. tit.*

Obſerve that the debtor has, in this caſe, the right to claim back one of the two things which he has paid, only whilſt they exiſt. If one of the two had ceaſed to exiſt ſince the payment, there would be no ground for reſtitution as is decided by Julian, in L. 32, ff. *d. tit.* The reaſon of this is evident. The action *condictio indebiti* reſtores the parties to the ſame ſituation as if payment had not been made, and was ſtill to be made. If it were yet to be made, the debtor could not avoid paying that which alone ſhould remain due; it ought therefore in this caſe to remain *in ſoluto* with the creditor, and the debtor cannot claim it back.

As to the indiviſibility of the payment of obligations under an alternative, ſee *infra, part* 3, *ch.* 1, *art.* 6, §. 3.

Article VII.

Of obligations in ſolidum *between ſeveral creditors.*

258. Regularly when one contracts the obligation of one and the ſame thing towards ſeveral perſons, each of thoſe to whom it is contracted is creditor of this thing only for his part; but it may be contracted towards each of them for the whole, when ſuch is the intention of the parties; ſo that each of thoſe to whom the obligation is contracted may be a creditor for the whole and yet that payment made to any of them may diſcharge the debtor as to all. This is called an obligation *in ſolidum*, and theſe creditors are called *correi credendi, correi ſtipulandi.*

259. We may adduce as an example of this kind of obligation, that which ariſes from a teſtamentary diſpoſition in theſe words: *my heir ſhall give to the Carmelites or Capuchins the ſum of* 100 *livres.* The heir, in this caſe, owes but one ſum; but he owes it entire to each of the convents who are creditors *in ſolidum;* ſo that, however, his paying this ſum to either of them will diſcharge him as to both; L. 16, ff. *de Legat.* 2. This kind of obligation is in little uſe among us; it ought not to be confounded with the indiviſible obligation, of which we ſhall ſpeak *infra.*

260. The effects of the obligation *in solidum* between the creditors are I. that each of the creditors, being a creditor of the whole, may conſequently demand the whole, and if the obligation be with title of execution, may conſtrain the debtor for the whole. II. The acknowledgment of the debt made to one of the creditors, interrupts the preſcription for the whole of the debt, and conſequently for the benefit of the other creditors. L. fin. *Cod. de duobus reis.* III. The payment to one of the creditors extinguiſhes the whole debt; for this creditor being a creditor for the whole, the payment of the whole to him is validly made; and this payment diſcharges the debtor as to all. For although there are ſeveral creditors, there is but one debt, which muſt be extinguiſhed by the entire payment made to one of the creditors.

The debtor has it at his option to pay to which of theſe creditors he pleaſes, while the debt remains entire; but if one of them had brought ſuit, the debtor would no longer be at liberty to pay to any other than him. *Ex duobus reis ſtipulandi, ſi ſemel unus egerit, alteri promissor offerendo pecuniam, nihil agit.* L. 16, ff. *de duobus reis.*

IV. Each of the creditors being creditor for the whole, may, before any one of his co-creditors has brought ſuit, releaſe the debt to the debtor and diſcharge him as to all: for as the payment of the whole, made to one of theſe creditors, diſcharges the debtor as to all; ſo the releaſe of the whole, which is equivalent to payment, made by one of the creditors, muſt diſcharge the debtor with regard to all. *Acceptilatione unius tollitur obligatio;* L. 2, ff. *de duobus reis.*

ARTICLE VIII.

Of the obligation in ſolidum *on the part of the debtors.*

§. I.

261. An obligation is *in solidum* on the part of theſe who have contracted it, when they oblige themſelves each for the whole, ſo, however, that the payment made by one of them may diſcharge all the others.

Thoſe who bind themſelves in this manner are called *correi debendi.*

As an obligation *in solidum* on the part of the creditors conſiſts in this, that the obligation of the ſame thing contracted towards ſeveral perſons, is contracted towards each of them for the whole, as entirely as if each was the only creditor, ſaving, nevertheleſs, that payment made to one of them diſcharges the debt as to all; ſo an obligation *in solidum* on the part of the debtors conſiſts in this, that the obligation of the ſame thing is contracted by each for the whole, as entirely as if each was the only debtor, ſo, however, that payment made by one of them diſcharges all the others.

262. That an obligation may be *in solidum* it does not always ſuffice that each of the debtors be debtor of the whole thing; as happens in the caſe of the obligation which is indiviſible and not ſuſceptible of parts, tho' it be not contracted *in solidum*: it is neceſſary that each of the debtors *totum & totaliter debeat*; that is to ſay, that each be as entirely bound to the payment of the thing, as if he alone had contracted the obligation.

263. It is neceſſary, above all, that the debtors be bound to the payment of the ſame thing. It would not then be an obligation *in solidum* of two perſons, but there would be two obligations, if two perſons bound themſelves to another for different things.

But provided they are each wholly bound for the payment of the ſame thing, though they be differently bound, they are, not the leſs, co-debtors *in solidum*, *correi debendi*; *puta*, if one is bound abſolutely and the other conditionally or with a time of payment; or if they are bound to pay in different places. L. 7, L. 9, §. 2, ff. *de duobus reis*.

It will perhaps be ſaid that it is inconſiſtent that one and the ſame obligation ſhould have oppoſite qualities; that it ſhould be abſolute with regard to one of the debtors and conditional with regard to the other. The anſwer is, that the obligation *in solidum* is indeed one and the ſame with regard to the thing that is the object, ſubject and ſubſtance of it; but it is compoſed of as many ties as there are different perſons who contracted it; and theſe perſons being different between themſelves, the ties by which they are bound are

to many different ties, which may consequently have as many different qualities. This is what Papinian intends, when he says, *Et si maxima parem causam suscipiunt, nihilominus in cujusque persona, propria singulorum consistit obligatio*; *d.* L. 2, §. 2. The obligation is one with regard to its object, which is the thing due, but with regard to the persons who contracted it, it may be said that there are as many obligations as there are persons bound.

264. When several persons contract a debt *in solidum*, it is with regard to the creditor only that each is debtor of the whole. With regard to themselves, the debt divides itself, and each is debtor for himself only to the amount of the part he had in the cause of the debt. Suppose, for example, that two persons borrow together a sum of money, which they bind themselves *in solidum* to repay; or that they buy a thing for the payment of which they bind themselves *in solidum* to the seller. If they have equally divided between them the money borrowed or the thing bought, each of them, though debtor of the whole to the creditor, is, as to his co-debtor, bound only for one half. If they have divided it unequally, *puta*, if one of them has received two thirds of the money borrowed or of the thing bought, and the other has received only one third; the one who has received two thirds will be debtor *for himself* of two thirds and the other only of one third. If one of them alone be benefited by the contract, and the other becomes bound with him *in solidum* in order to serve him, the one who has alone been benefited is the only debtor; the other, though a principal debtor with regard to the creditor, is, with regard to his co-debtor with whom he became bound merely to serve him, what a security is with regard to the principal debtor for whom he has become bound.

Likewise, if the debt *in solidum* proceeds from a tort committed by four persons, each of them is a debtor *in solidum* with regard to the person against whom the tort has been committed; but with regard to themselves each is a debtor for the part he had in the tort, that is to say, each for his fourth part.

preſſed, is that of the obligation which ſeveral tutors contract who undertake the management of the ſame infant's eſtate; or of that which ſeveral perſons contract who undertake to act as wardens or truſtees of a corporation. Theſe offices create an obligation in the perſons undertaking them, which is *in solidum*, according to the diſpoſition of the laws that are, in this reſpect, obſerved among us, unleſs there be ſome uſage to the contrary.

The civil law granted to tutors who had not acted, the benefit of order and diſcuſſion, which conſiſted in ſending the minor on his coming of age, to proſecute at their coſts the tutor who had acted. It granted alſo to tutors who had acted jointly, the benefit of diviſion when they were all ſolvent. See *infra* 270, *ad med.* But theſe exceptions or pleas granted to tutors, truſtees, &c. are not in uſe among us. Therefore, when Dumoulin, *Tract. de Div. & ind. n.* 3, *n.* 166, ſays that tutors have this benefit of diviſion for the payment of the balance of their accounts, excepting the ſingle caſe in which they are debtors *ex dolo*, he muſt be underſtood to mean that they have this benefit according to the civil law, and in thoſe provinces in which the civil law is in this particular obſerved.

268. The third caſe of an obligation *in solidum* is of that which ariſes when ſeveral perſons have concurred in a tort; they are bound *in solidum* for the damages.

They are not allowed the plea of diſcuſſion or diviſion, being deemed unworthy of it.

269. There may alſo reſult an obligation *in solidum* from a clauſe in a teſtament by which the teſtator expreſsly declares that he charges his heirs or other ſucceſſors *in solidum* with the payment of a legacy.

Even though no charge *in solidum* be expreſſed in the will, thoſe whom the teſtator has charged with the legacy are bound *in solidum* when the teſtator has uſed a disjunctive; as when he has ſaid "my ſon Peter or my ſon James "ſhall give to a certain perſon 10 crowns." This is the deciſion of the law, 8, §. 1, ff. *de leg.* 1. *Si ita scriptum sit.* "*L. Titius hæres meus, aut Mævius hæres meus, decem Scio dato.*"

cum utro velit, Seius aget, at si cum uno actum sit & solutum, alter liberetur, quasi si duo rei promittendi in solidum obligati fuissent. Yet Dumoulin pretends *Tract. de Div. & ind. p.* 3, *n.* 153, 154, 155, that this obligation is not an obligation perfectly *in solidum*; that altho' each of the persons named is bound for the whole of the legacy and they resemble debtors *in solidum*, yet they are not debtors truly *in solidum*, and their obligation has not the other effects of obligations *in solidum*. For example. If two heirs were thus charged with the legacy of a determinate thing which should be destroyed by the act of one of them, he does not think that the other would be bound for the loss as a debtor *in solidum* would be; *infra*, *n.* 273. In this Dumoulin deviates from the common opinion taught by Bartolus on this law, and by the other doctors, who recognize, in the case put in this law, an obligation truly *in solidum*. Dumoulin grounds his position on these words *quasi si duo rei*, &c. which indicates, he says, that the two heirs are not, in the instance in this law, truly *correi*, the adverb *quasi* being *adverbium improprietatis*. I would rather incline to the opinion of Bartolus. These heirs being, in this case, debtors of the whole, not from the quality of the thing due, but from the intention of the testator, which was that they should be chargeable each for the whole of the legacy, their obligation appears to me to have all the characters of an actual obligation *in solidum*, and I do not perceive any thing wherein it varies. It does not appear to me that the adverb *quasi* ought to be taken *pro adverbio improprietatis*; it ought rather, as it appears to me, to be taken for *quemadmodum* in this sense; these two heirs are bound *in solidum* as much as if they were thus bound by a stipulation. For it is not by stipulation only that one may contract an obligation *in solidum*, *non tantum verbis stipulationis sed & ceteris contractibus duo rei promittendi fieri possunt*; L. 9, ff. *de duobus reis*; and wills, as well as contracts, may create such obligations.

§. III.

Of the effects of the obligation in solidum *between several debtors.*

270. These effects are, I. that the creditor may apply

to whom he pleaſes of the debtors *in solidum* and exact from him, by demand, if the debt lies only in action, or by conſtraint, if it lies in execution, the whole of what is due him. This is a neceſſary conſequence of the principle that each of the debtors *in solidum* is a debtor for the whole.

I do not even think that the co-debtors, who have bound themſelves *in solidum*, have the benefit of diviſion; that is to ſay, that the one of them from whom the creditor demands the whole ſhould be received, on offering his part, to demand that the creditor be ſent back to the other debtors for their reſpective parts, when they are ſolvent. Contracts entered into before a notary, generally contain a clauſe renouncing the benefit of diviſion; and if they were not to contain ſuch clauſe, I do not think it ſhould be allowed: the law 47, ff. *Locati*, ſays it is more juſt to deny it to them; *quanquam fortasse sit justius, &c.*

It is true that the novel grants it to debtors *in solidum*, who become ſecurities for each other *alterna fidejussione obligatis*; but I do not think this is followed among us. No other advantage is granted to the debtor *in solidum*, who is proſecuted for the whole debt, than to allow him to demand the ſubrogation or ceſſion of the actions of the debtor againſt the other debtors *in solidum*. See, on this ſubrogation, *infra, part.* 2, *ch.* 1, *art.* 6, §. 2.

271. Note that when the creditor elects one of the debtors againſt whom to bring his ſuit, this does not diſcharge the others, while he remains unpaid; he may withdraw his ſuit againſt the one he has ſued, and ſue the others or all at the ſame time, if he pleaſes; L. 28, *Cod. de Fidejus.*

272. II. The demand made on one of the debtors *in solidum*, interrupts the preſcription with regard to all the others; L. *fin. Cod. de duobus reis.* This is a further conſequence of the principle that each of the debtors is a debtor for the whole. For the creditor in making a demand on him, has demanded the whole debt. He has therefore interrupted the preſcription for the whole debt, even with regard to the debtors on whom he made no demand, who could only oppoſe the preſcription to the creditor when he had not ex-

erciſed his right in regard to the debt for which they are bound? but this, in the preſent caſe, they cannot pretend, ſince the debt for which they are bound is the ſame which was demanded in the whole from their co-debtor.

273. III. For the ſame reaſon, when the thing due has periſhed by the act or fault of one of the debtors *in ſolidum* or ſince he has been put in arrear, the debt is perpetuated not only againſt this debtor, but againſt all his co-debtors who are all bound *in ſolidum* to pay the creditor the price of the thing; for the debt of each of them being one and the ſame debt, it cannot exiſt as to one and be extinguiſhed as to the others; this is the deciſion of the law *penult.* ff. *de duob. reis. Ex duobus reis ejusdem Stichi promittendi factis, alterius factum alteri quoque nocet.* For example. If Peter and Paul have ſold me *in ſolidum* a horſe, and, before a delivery had been made, the horſe died by the fault of Peter, Paul will remain my debtor as well as Peter and I ſhall have a right to demand the value of the horſe from him as well as from Peter, ſaving to him his recourſe againſt Peter: whereas if they had ſold not *in ſolidum*, Peter alone would be chargeable for his fault; and Paul by the death of the horſe, altho' it happened thro' the fault of Peter, would be wholly diſcharged from his obligation and would, not the leſs, remain my creditor for the half of the price of the horſe, in the ſame manner as if the horſe had died by mere accident. *Molin. Tract. de Div. & indiv. part.* 3, *n.* 126.

Obſerve that the act, fault or arrear of one of the debtors *in ſolidum* prejudices, indeed, his co-debtors *ad conſervandam et perpetuandam obligationem*, that is to ſay, that they be not diſcharged from the obligation, by the loſs of the thing, and that they be bound to pay the price of it. It is in this ſenſe that the law *penult*, ff. *de duobus reis*, ſays, *Alterius factum alteri quoque nocet.* But the fault, act or arrear of one of them does not prejudice the other, *ad augendam ipsorum obligationem*; that is to ſay, that it is only he who has committed the fault or who has been put in arrear, who ought to be anſwerable for the damages which may reſult from the inexecution of the obligation, beſides the

price of the thing due. As to the other debtor who has committed no fault and who has not been put in arrear, he is bound to nothing elſe than to pay the price of the thing which has periſhed by the fault or ſince the arrear of his co-debtor. His obligation may be perpetuated, but not increaſed by the fault or delay of his co-debtor. For the ſame reaſon it is only he who has been put in arrear who ought to be anſwerable for the damages reſulting from the delay: it is in this ſenſe that the law 32, §. *penult.* ff. *de Usuris*, ſays, *Si duo promittendi sint, alterius mora alteri non nocet.*

Dumoulin confines the deciſion of this law to the damages which have not been expreſsly ſtipulated; if any had been ſtipulated, they would all be liable for them: the act or arrear of one of them cauſing the condition of the inexecution of the obligation, under which they all bound themſelves for theſe damages, to take effect. *Molin. ibid. n.* 127.

274. IV. The payment which is made by one of the debtors, diſcharges all the others; this is a conſequence of the principle that the debt *in solidum* is a ſingle debt of the ſame thing of which there are ſeveral debtors.

Not only the actual payment, but every other kind of payment ought to have this effect; therefore, for example, if one of the debtors *in solidum*, ſued by the creditor, has oppoſed as a ſet off, to the ſum that was demanded of him, a like ſum which the creditor owed him, his co-debtors will be diſcharged as well by this ſet off as they would have been by the actual payment of the ſum due.

Peter and Paul became my debtors *in solidum* of 1000 livres; I afterwards became debtor to Peter of the like ſum. If I have ſued Peter for the payment of the ſum due me by Peter and Paul, and he has oppoſed, as a ſet off, the like ſum which I owe him: according to what has juſt been ſaid, this ſet off is equivalent to payment, the debt which was due me by Peter and Paul *in solidum*, is by this ſet off extinguiſhed as to both. But if I have not ſued Peter, and I ſue Paul for the payment of this ſum, may Paul oppoſe, as a ſet off, the debt of 1000 livres which I owe to his co-debtor? Papinian in the law 10, ff. *de duobus reis*, decides the queſ-

tion in the negative: *Si duo rei promittendi socii non sint, non proderit alteri, quod stipulator alteri reo pecuniam debet.*

Yet Domat, in his civil law, *p.* 1, *l.* 3, *t.* 3, § 4, *art.* 8, decides againſt this text, that Paul may oppoſe as a ſet off the ſum which I owe to Peter, for the part of the debt for which Peter with regard to Paul is bound and not for the ſurplus. His reaſon is that Peter ceaſing to be my debtor of the part, which he owed, of the debt, by the ſet off of the ſum which he had a right to oppoſe, Paul ought not to be compelled to pay for Peter this part, from which Peter is diſcharged by the ſet off. This reaſon is not abſolutely concluſive; for when a debtor *in solidum* pays the whole of the debt it is not with regard to the creditor that he pays the parts of his co-debtors; he pays what he owes himſelf, and conſequently he can only oppoſe as a ſet off what is due to him, and not what is due to his co-debtors: on this is founded the deciſion of Papinian. It may be ſaid in favor of that of Domat that it avoids circuity; for when Paul pays me the whole ſum which he owes with Peter *in solidum*, Paul will have recourſe againſt Peter for the part for which he was bound; and for this part he will attach in my hands what I owe to Peter and recover from me, to the amount of this part, what I have received. This laſt reaſon ſhould induce us to follow, in our practice, the deciſion of Domat.

275. A releaſe of the debt *in solidum* made by the creditor to one of the debtors, would alſo diſcharge the other, if it appeared that the creditor, by this releaſe, intended to extinguiſh the whole debt.

If it appeared that his intention was only to extinguiſh the debt as to the ſhare for which he to whom he made the releaſe was chargeable with regard to his co-debtors; and to diſcharge from the ſurplus of the debt the perſon of this debtor, the debt would, notwithſtanding, remain as to the ſurplus againſt the other debtors. *Quid*, if the creditor, by the releaſe he made to this debtor, had expreſsly declared that he intended merely to diſcharge the perſon of this debtor, and to preſerve his claim entire as to the perſons of the other co-debtors? Could he, under this proteſtation, re-

quire the whole from the other debtors, without any deduction for the part of him whom he has discharged? I think he could not. The reason is that the debtors *in solidum* would not have bound themselves *in solidum*, but only for their parts, if they had not counted that on paying the whole debt, they would have recourse against their co-debtors, and that they would have, for this purpose, the cession of the actions of the creditor for the other parts. It was only under the implied condition of this cession of the creditor's actions that they have bound themselves *in solidum*; and consequently the creditor has no right to demand from each of them the whole, except under the condition of this cession of actions. In this instance the creditor having disabled himself by his own act to cede his actions against the debtors whom he has discharged, and consequently put it out of his power to perform the condition under which he has the right to demand the whole debt, it follows that he cannot demand from each the whole debt: *repellitur exceptione cedendarum actionum.* See, of the cession of actions, *infra, part.* 3, *ch.* 1, *art.* 6, §. 2.

When there are several debtors *in solidum* and the creditor has discharged one of them, does the obligation cease entirely to be *in solidum*? Or may he sue each of the other debtors for the whole with the deduction only of the part of him whom he has discharged and of the part which he whom he has discharged would have been liable for, in case of the insolvency of some of the other debtors? For example. If I had six debtors *in solidum*, and I have discharged one of them; of the five which remained, one is insolvent; can I sue each of the others only for their sixth part, or may I sue each of them for the whole with a deduction only of the sixth part for which he whom I have discharged was liable, and of the part with which he would have been chargeable for the share of the insolvent debtor? I think I should be well grounded; for this debtor whom I sue, cannot claim to have any other deduction than what he loses by not having the cession of my actions against him whom I have discharged: this cession would only have given to him the right to demand from him his share, and to make him contribute to-

wards that of the insolvent debtors, as we shall see, *infra*, *n.* 281.

276. When one of the debtors *in solidum* is become the only heir of the creditor, the debt is not extinguished against the other debtors: for the confusion *magis personam debitoris eximit ab obligatione, quam extinguit obligationem.*

But this debtor who has become the heir of the creditor, can exact it from the other debtors only under a deduction of the part for which he was chargeable with regard to the other debtors; and if any of them be insolvent, he ought, besides, to bear his part of the share of the insolvent debtor. It is the same in the inverse case, when the creditor has become the sole heir of one of the debtors *in solidum.*

§. IV.

Of the release of the liability in solidum.

277. The right which the creditor has against several debtors of the same debt, to demand the whole from each of them, being established in his favor, it is not to be doubted that according to the maxim, *Cuique licet juri in suum favorem introducto renuntiare*, a creditor of age, having the free disposition of his property, may renounce this right. He may renounce it, either in favor of all the debtors, by consenting that the debt be divided between them, or in favor of one of the debtors, whom he may discharge from his liability *in solidum*, reserving his right against the others, holding each of them liable for the whole; so, however, that the discharge which he has given to one of them do not prejudice the others, as has been observed, *n.* 275.

He may renounce this right expresly or impliedly.

He is presumed to have renounced it impliedly, when he has admitted one of his debtors to pay the debt *for his part*, so naming it. This is the decision of the law 18, *Cod. de Pact. Si creditores vestros*, ex parte *debiti admisisse quemquam vestrum pro sua persona solventem probaveritis, aditus rector provinciæ, pro sua gravitate, ne alter pro altero exigatur providebit.*

The reason is, that when the creditor gives a receipt to

one of the debtors *in solidum* in these words, "I have received of A. B. the sum of ——— for his part," he acknowledges him to be debtor of the debt *for a part*; and consequently he consents that he be no longer liable for the whole, it being two opposite things to be debtor *for a part*, and debtor for the whole.

This decision does not apply when the receipt by which the creditor acknowledges to have received from A. B. ——— *for his part*, expresses a reservation of the debtor's liability for the whole; for the express terms by which the creditor reserves to himself his right to hold the debtor liable for the whole, removes the implication which would be raised from the words *for his part*, used in the receipt, to induce from them a renunciation of the liability *in solidum*. And granting even that these words *for his part*, should be as formal in favor of the renunciation of the liability *in solidum* as the express reservation is formal against this renunciation, it would only follow that these words *for his part*, and these *without prejudice to my claim for the whole*, would destroy each other and the receipt be regarded as if it contained neither; in which case it cannot prejudice the right of the creditor to hold each of the debtors liable for the whole. This is the reasoning of Alciat, *ad d.* L. 18.

It will perhaps be objected that in this receipt the words *without prejudice, &c.* ought to be understood as a reservation, which the creditor makes of his right against the other debtors to hold them liable each for the whole, and not against him to whom he has given the receipt; in this way it may be supposed that these words are reconcileable with the words *for his part*, made use of in the receipt. This explication is a bad one. When in a receipt, as in all other instruments, rights are reserved without its being said against whom, it is natural to understand the rights which the party who reserves them has against the party with whom he treats or to whom he gives the receipt, and not those which he has against others. The words *for his part*, are more properly reconciled with the reservation, by saying that, in this case, the creditor who has reserved his claim

for the whole, has intended by theſe words *for his part*, not the part for which this debtor would be liable to him the creditor, but the part for which this debtor is actually liable with regard to his co-debtors; which part the creditor was willing to receive from him, ſaving to himſelf the right to demand from him the ſurplus in virtue of his liability for the whole, from which he does not diſcharge him. This is one of the points ſettled in a caſe of the 6th of September, 1712, reported in the 6th volume of the *Journal des Audiences*.

When the receipt expreſſes *without prejudice to my rights*, it is the ſame as if it had expreſſed *without prejudice to my claim for the whole*; for the right to claim the whole is included in the general expreſſion *without prejudice to my rights*; and indeed the reſervation of this right has the greateſt relation to the receipt which I give, and ſerves as an explanation of the words *for his part* made uſe of in the receipt. *Alciat, ad dict. leg.*

When the creditor has given to one of the debtors *in solidum* a receipt ſimply for a certain ſum, which makes exactly that for which the debtor is liable for his part of the debt towards his co-debtors, without expreſſing that he received it *for his part*, ought the creditor to be preſumed to have releaſed to the debtor his liability *in solidum?* I think he ought not; the deciſion of the law *Si creditores*, above cited, ought to be confined to the caſe there ſtated, which is that in which one of the co-debtors was admitted to pay expreſsly his perſonal part, *ex parte pro persona sua*, and it is this expreſſion in the receipt, that the creditor receives *for the part* of this debtor, from which is derived the preſumption in favor of the renunciation of his right to claim the whole. But if the creditor has indeed been willing to receive from one of his debtors a part of his debt, for the whole of which this debtor was liable, it ought not, from this alone, to be concluded that he intended to diſcharge him from his liability *in solidum*: for this conſequence does not neceſſarily follow; and it ought not to be derived without neceſſity, as no one is preſumed to releaſe his rights: *Nemo facile donare præsumitur*. This is the deciſion of the law 8, §. 1, ff. *de leg.* I., in the inſtance of two heirs whom

the teſtator had charged *in solidum* with the payment of a legacy. Pomponius decides that the legatee who has demanded or even received the part of one of the co-debtors, is not preſumed, for this reaſon, to have diſcharged him from his liability for the whole, and that he may exact from him the ſurplus. *Quid si ab altero partem petierit? Liberum erit ab alterutro reliquum petere; idem erit & si alter partem solvisset.* Bacquet, *Traite des Droits de Justice, ch.* 21, *n.* 245; and Baſnage, *Traite des Hypoth. part.* 2, 4, are of this opinion.

Bartolus pretends that there is in this reſpect a difference between debtors *in solidum* by teſtament and thoſe by acts *inter vivos:* but this diſtinction is not founded on any ſolid reaſon.

Obſerve that theſe words of the law, *idem erit & si alter partem solvisset*, muſt be underſtood of the caſe in which the creditor, without having made any demand, voluntarily receives from one of the debtors *in solidum* the ſum which amounts to that which the debtor owes for his part, without expreſſing in the receipt that he receives it *for his part* as will be noticed hereafter.

When a creditor has made a judicial interpellation on one of the debtors *in solidum* to pay a certain ſum *for his part* of the debt, or when he has cited him to pay *his part* of the debt is he preſumed, for this alone, to have divided the debt and diſcharged this debtor from his liability *in solidum*? The authors are divided on this queſtion. Baldus is for the affirmative, and Bartolus for the negative. For the affirmative it will be ſaid that there appears to be the ſame reaſon for the deciſion in this, as in the caſe in the law *Si creditores* above mentioned. In that caſe, the creditor who expreſſed in formal terms in the receipt which he had given to one of the debtors *in solidum*, that he had received a certain ſum *for his part*, had, by theſe words, acknowledged and admitted that he was debtor only *for his part*, and conſequently that he was no longer debtor *in solidum*, it being two oppoſite things to be debtor *for his part* and debtor for the whole. When a creditor has expreſſed in the judicial interpellation or ſummons to the debtor *in solidum* that he demands from

him a certain ſum *for his part*, has he admitted that this debtor ſhould no longer be liable for the whole? There appears to be the ſame reaſon, in this caſe to decide that the creditor has diſcharged him from his liability *in ſolidum*, as in the caſe of the law *Si creditores*.

On the contrary, they alledge, in behalf of the negative, the law *Reos*, 23, *Cod. de Fid.* and the law 8, §. 1, ff. *de Leg.* 1. above cited. The law *Reos* does not appear to me in any manner to decide the queſtion; but the law 8, §. 1, formally decides that a debtor *in ſolidum* is not diſcharged from his liability for the whole, by the demand of the creditor *for his part*; ſince it decides that the creditor notwithſtanding the demand is not precluded from requiring the ſurplus from either of the debtors and conſequently not from him even from whom he had firſt demanded his part: *Quid, ſi ab altero partem petierit? Liberum erit ab alterutro reliquum petere.* The reaſon is, that as debts are contracted by a concurrence of the will of the creditor and the debtor, the releaſe can be made only by the conſent to the contrary of the ſame parties; *part* 3, *ch.* 3, *art.* 1. §. 3. Hence it follows, that ſuppoſing the demand on one of the debtors *in ſolidum* to pay *his part*, ſhould include an intention in the creditor to releaſe his liability for the whole; as long as the will of the debtor has not concurred with that of the creditor, as long as the debtor has not acquieſced in this demand and offered in conſequence thereof to pay his part, this demand cannot cauſe any right to be acquired to the debtor nor cauſe him to be diſcharged from his liability *in ſolidum*, and conſequently cannot prevent the creditor from augmenting his demand and claiming from him the whole of the debt. In this the preſent caſe differs from the caſe in the law *Si creditores*, in which the will of the debtor who pays his part of the debt to the creditor who is contented therewith, concurs with that of the creditor in the releaſe of the ſurplus.

When the debtor who is ſued for the payment of his part, before the creditor has augmented his demand, has paid his part or only offered indeed to pay it, it appears to me there would be entirely the ſame reaſon to decide, as in the law *Si creditores*, for the diſcharge of the liability *in ſoli-*

dum. Therefore I think that theſe laſt words of the law 8, §. 1, ff. *de Leg.* 1. *idemque erit & ſi alter partem ſolvisset*, which make a ſeparate clauſe in this paragraph, muſt be confined to the caſe of a voluntary payment made without its being expreſſed in the receipt that the creditor has received *for his part*, and that they ought not to be extended to a payment made in conſequence of a ſuit againſt the debtor for the payment of *his part*.

Likewiſe, when, upon the ſuit of the creditor againſt one of the debtors *in solidum* for the payment of *his part*, a judgment has intervened, by which he is condemned to pay his part, the creditor can no longer demand from him the ſurplus; the judgment has ſupplied, in this reſpect, the will of the debtor in the acceptance of the releaſe of the ſurplus: *cum in judiciis quasi contrahamus, & judicatum quandam novationem inducat.* This is the opinion of Bacquet, *ibid. n.* 247.

278. When there are more than two debtors *in solidum*, does the receipt given to one of them, expreſſing that it is for the payment *of his part*, diſcharge from the liability *in solidum*, all the debtors, or him only to whom it is given? The authors have again been divided on this queſtion. The ancient doctors maintained the affirmative, grounding themſelves on the law *Si creditores*, above cited. Peter de L'Etoile, celebrated profeſſor at the univerſity of Orleans, commonly called Stella, is the firſt, according to Alciat *ad d. Leg.* who maintained the negative. His opinion ſeems to be the moſt accurate, and moſt conformable to the principles of law. The law *Si creditores* well underſtood, is not oppoſed to it. This law is grounded on an agreement, which is preſumed to have tacitly intervened for the diſcharge of the liability *in solidum* between the creditor, and the debtor to whom he has given the receipt. It is one of the moſt poſitive principles of law that agreements can create no right to any perſons but ſuch as are parties to them *supra, n.* 85, *& seq.* Hence it follows that this could procure a diſcharge from the liability *in solidum* only to the debtor to whom he gave the receipt, who is the only one with whom he treated, and it cannot give any right to the others whom the creditor had not in view in this agreement.

the favor which the creditor was willing to ſhew to one of his debtors in admitting him to pay the debt for his part only, ought not to prejudice him with regard to the others. *Benitas creditoris*, ſays Alciat, *ad d. L. non debet esse ei captiosa*; the law *Si creditores* on which the antient doctors ground their opinion, has no reference to this queſtion. It ſeems even that in the caſe in this law, there were but two debtors *in solidum*; if there had been more, the Emperor would have ſaid *Rector providebit, ne unus pro cæteris exigatur.* Theſe words *ne alter pro altero exigatur*, deſignate two debtors only, and are to be underſtood in this ſenſe: *ne alter qui solvit, pro altero qui nondum solvit exigatur.*

This deciſion muſt be followed with this modification, that if among the debtors that remain, there be ſome inſolvent, the others ought to be diſcharged from the part, which the one who was diſcharged from his liability *in solidum*, would have otherwiſe been liable for on account of the inſolvency; for if they ought not to be benefited by this diſcharge they ought not to be prejudiced by it. We muſt, however, admit that Bacquet, *ibid. n.* 245, after having ſaid that the opinion of L'Etoile appeared to him to be equitable, avows that the contrary one, which is that of the ancient authors, is followed in the Chatelet of Paris: but I think this is an error which ought to be reformed, if it has not been already.

When the creditor has obtained judgment againſt one of his debtors *in solidum* for *his part* of the debt, it muſt, according to the ſame principle, be decided that the judgment ought not to diſcharge the other debtors from their liability *in solidum*. *Cum res judicata aliis non prosit*; and that they may only require that, in caſe there be ſome of them inſolvent, the creditor ſhould allow them a deduction of the part which the debtor whom he has diſcharged would have been liable for on account of the inſolvency.

279. There remains for us a queſtion to examine whether, when there are ſeveral debtors *in solidum* of a rent, the receipt which the creditor has given to one of them of a certain ſum for *his part* of the arrearages then due, diſ-

charges him from his liability *in solidum* for the future, or only as to the arrearages then due, for which the receipt was given. It muſt be decided that it diſcharges him from his liability *in solidum* only for the arrearages due and for which the receipt was given, and not for the future. This deciſion is grounded on the principle above cited, *Nemo facile præsumitur donare.* Hence it follows that we ought not to infer from the receipt given by the creditor, that he intended to diſcharge the debtor from his liability for the whole debt, unleſs this implication were neceſſarily to ariſe and it does not neceſſarily ariſe: for from the creditor's having been willing to allow this debtor to pay *his part* of the arrearages that were due, and for which a receipt was given *for his part*, it follows only that the creditor was willing to diſcharge him from his liability *in solidum* for theſe arrearages; but it by no means follows that he was willing to diſcharge him from his liability *in solidum* for the rent that was to accrue. Such is the deciſion of *Alciat ad d. L. Bacquet, ibid. n.* 246.

Nevertheleſs, if during the time required for the preſcription, (i. e. during the ſpace of 30 years) the debtor had been always admitted to pay the arrearages *for his part*, this debtor would acquire, by the preſcription, a diſcharge from his liability *in solidum*, even for the future. *Alciat, Bacquet, ibid.* But even in this caſe, as Bacquet obſerves, *ibid.* the debtor would not have acquired the right of redeeming the rent for his part alone. For from the creditor's having been willing to diſcharge him from his liability *in solidum*, for the payment of the arrearages, it by no means follows that he likewiſe conſented to the diviſion of the redemption of the rent.

§. V.

Of the ceſſion of the actions of the creditor, which a debtor in ſolidum, *on paying the whole debt, has a right to demand.*

280. The debtor *in solidum*, who pays the whole debt, may, if he chooſes, extinguiſh the debt only for ſo much as he is bound, himſelf, to pay, for his part, and without recourſe. See *supra, n.* 264. He has a right to inſiſt on the

ceſſion of the creditor's actions for the ſurplus againſt his co-debtors; and by this ceſſion of actions he is preſumed rather to purchaſe the claim of the creditor for the ſurplus, againſt his co-debtors, than to have diſcharged it. *Creditor non in ſolutum accepit, ſed quodammodo nomen creditoris vendidit* L. 36, ff. *de Fidejus.*

The creditor cannot refuſe this ſubrogation or ceſſion of his actions, to the debtor *in ſolidum* who pays the whole debt, when he requires it from him; and even if he had diſabled himſelf from making it againſt any of them he would impair his right to claim for the whole as has been ſaid, *ſupra.*

Further, when the creditor has, by the act of payment, required the ſubrogation; even if the creditor were to refuſe it, the debtors, according to our uſages, would, not the leſs, enjoy the ſubrogation, without ſuing the creditor to make him yield it. The law ſupplies in this caſe what the creditor ought to have done, and ſubrogates the debtor, who has required the ſubrogation, to all the rights and actions of the creditor.

Quid, if the debtor had paid without requiring the ſubrogation? He could not afterwards cauſe himſelf to be ſubrogated to the actions of the creditor. For the abſolute payment having extinguiſhed the claim with all the rights and actions reſulting from it, it is impoſſible to cede to him afterwards what has ceaſed to exiſt. *Si poſt ſolutum, ſine ullo pacto, omne quod ex causa tutelæ debetur, actiones poſt aliquod intervallum ceſſæ ſint, nihil ea ceſſione actum, tam nulla actio ſuperfuit*; L. 76, ff. *de Solut.*

The Doctors, among other texts of law, uſually cite this to ſhew that the ſubrogation does not take place *ipſo jure*, if it be not required by the payment which is made by the debtor *in ſolidum*, or a ſecurity, or ſome other perſon, paying what he owes for or with others: indeed this text ſeems to decide it in words formal enough. Yet Dumoulin in the firſt ſolemn lecture he read at Dole, has pretended, againſt the opinion of all writers, that a debtor *in ſolidum*, a ſecurity or any other perſon paying what he owes for or with

another, was in conſequence of the payment, *ipso jure* ſubrogated, although he may not have required the ſubrogation. His reaſon is that they ought always to be preſumed to have paid only on condition that they ſhould have this ſubrogation which they have a right to demand; no one being to be preſumed to neglect or renounce his rights. He pretends that the caſe in this law 76, is not, as they have all thought, the caſe of a tutor who had paid the balance which he owed *in solidum* with his co-debtors, without requiring the ſubrogation againſt them; but that it is the caſe of the friend of a tutor, who had paid for him without being bound for the debt. Dumoulin pretends that this is the only caſe in which there is no ſubrogation, when no mention of it is made in the receipt; becauſe in this caſe the creditor not being bound to cede his action, a ceſſion of actions in this caſe is not to be preſumed if it be not expreſsly agreed upon. But whenever he, who has paid, had an intereſt in paying, and had conſoquently a right to the ſubrogation of the creditor's actions againſt thoſe for or with whom he was debtor for what he has paid, he ought always, according to Dumoulin, to be preſumed to have been ſubrogated; although he did not require the ſubrogation. He grounds his opinion principally on the law, 1, §. 13, ff. *de Tut. & rat.* which he underſtands in a ſenſe quite different from that in which this text has always been underſtood. It is ſaid *si forte quis ex facto alterius tutoris condemnatus præstiterit, vel ex communi gestu, nec ei mandatæ sunt actiones, constitutum est a D. Pio & ab Imperatore nostro & patre ejus, utilem actionem tutori adversus contutorem dandam.* Whereas the text is underſtood ordinarily of the action *utilis negotiorum gestorum*, which theſe conſtitutions grant in this caſe to the tutor againſt his co-tutor, in which action there was a difficulty, becauſe this tutor, in paying that to which he was condemned in his own name, *non contutoris, sed magis proprium negotium gessisse videbatur*; Dumoulin, on the contrary, underſtands this text to be of the action of wardſhip, which the minor had againſt the other tutor, called *utilis*, becauſe the law, *utilitate ita suadente* for want of an expreſs ceſſion, ſubrogates to it the tutor who has paid.

This opinion has not prevailed, and they have continued to teach in the ſchools and to decide in courts, that a co-debtor *in ſolidum*, a ſecurity and all thoſe who pay what they owe for or with others, are only ſubrogated to the actions of the creditor, when they have required the ſubrogation. The reaſon is, that according to a principle acknowledged by Dumoulin himſelf, no ſubrogation is made *ipso jure*, unleſs the law expreſſes it. *Non transeunt actiones, nisi in casibus jure expressis.* Dumoulin cannot quote any text of law, eſtabliſhing in this caſe the ſubrogation. The law 1, §. 13, *ff. de Tut. & rat.... distr.* which is the principal ground of his opinion, does not eſtabliſh it, there being no neceſſity of conſtruing this text in the ſenſe in which Dumoulin does, of an action *utilis tutelæ*, to which the tutor, who has paid, might be ſubrogated; and the text may be underſtood in a ſenſe much more natural, of the action *utilis negotiorum gestorum*. This text, far from eſtabliſhing that the ſubrogation is made, in this caſe, *ipso jure*, on the contrary, ſuppoſes that it is not made. This is the natural ſenſe which the law 76, *ff. de Solut.* preſents; that which Dumoulin gives to this law is not. The law 39, *ff. de Fidej.* and the law 11, *Cod. de tit.* admit, ſtill leſs, of objection. Theſe laws decide that the ſecurity who has failed, on paying, to cauſe himſelf to be ſubrogated, has no action againſt his co-ſecurities; which very clearly ſuppoſes that he is not ſubrogated *de jure*, without requiring the ſubrogation. For if this had been the caſe, it would have been uſeleſs to conſult the Emperor Alexander to know whether he had an action. In vain would it be ſaid, in ſupport of the opinion of Dumoulin, that the debtor *in solidum* having a right to cauſe himſelf to be ſubrogated to the action of his creditors againſt his co-debtors, ought not to be preſumed to have renounced this right, becauſe no one is preſumed to renounce his rights. The anſwer is, that this right, conſiſting of the mere faculty, which he has, of requiring the ſubrogation, which he may uſe or forbear to uſe, it is not enough that he be not to be preſumed to have renounced his right, it ought to appear that he uſed this faculty, which does not appear, if he has not declared it. The debtor who pays, having another motive in paying

him to acquire the ſubrogation, viz. that of avoiding the ſuit of his creditor and diſcharging his perſon and his property. The payment, which he makes without requiring the ſubrogation, ſhews only that he wiſhed to diſcharge himſelf; not that he intended to acquire the ſubrogation. Beſides, if it ſhould be ſuppoſed that he had the intention to acquire the ſubrogation, this intention, kept within himſelf, would not be ſufficient; his right conſiſting of the faculty of requiring it, the ſubrogation cannot take place, when he does not require it. It is true the law grants it if the creditor fails to yield it; but in order to ſay that there is a failure in the creditor, he ought to have been put in arrear to yield it, by the demand which the creditor ought to make. It is for this reaſon that modern authors have continued to follow the common opinion.

Renuſſon, *Traite des Subrogations*, *ch.* 7, *n.* 68, *& ch.* 9, *n.* 7, maintains this laſt opinion. It has been followed alſo in a number of adjudged caſes. There is one of them of the 26th of Auguſt, 1706, reported in the fifth volume of the *Journal des Audiences*, in which it was determined that a ſecurity, having paid without requiring the ſubrogation, was not ſubrogated to the actions of the creditor, and that he had conſequently no action againſt the wife of the debtor, who had bound herſelf to the creditor for the return of her huſband to priſon, or to pay for him.

There are, however, certain caſes in which the ſubrogation takes place *ipso jure*. See *Intr. au tit.* 20. *Cout. d'Orleans. ch*, 1, §. 5.

281. The debtor *in ſolidum* who, in paying, has required the ſubrogation, is, for the ſurplus of that for which he was debtor on his own account and without recourſe, ſubrogated to the actions of the creditor, not only againſt his co-debtors, but againſt their ſecurities, if they have given any to the creditor. He is ſubrogated to all the privileges and rights of hypothecation attached to the actions of the creditor, and he may exerciſe them, even againſt third perſons, as well as the creditor, of whom he is *procurator in rem ſuam*, might have done.

When there are several co-debtors, as for example, when an obligation has been contracted *in solidum* by four persons, it is a question much controverted, whether one of the four who has paid the whole debt, with subrogation, may sue each of his co-debtors for the whole debt, deducting only the fourth part, with which he was himself chargeable, and for which he could not be subrogated, or whether he can only sue each of them for his fourth part? The question was anciently decided in favor of the first opinion. Indeed it seems at first, that as the debtor is by the subrogation *procurator in rem suam* of the creditor, he may use the actions of the creditor against each of his co-debtors for the whole as the creditor himself might have done. However, the late decisions have been for the other opinion. One of them is reported in the *Journals du Palais, tom.* 1. *p.* 615, of the 22d of February, 1650, which was followed by another of September 5, 1674. The reason is, that otherwise, there would be a circuity of actions, for the one of my co-debtors from whom I may have exacted the whole debt with a deduction of my part, would have a right, on paying, to be subrogated to the actions of the creditor, deducting the part for which he is himself liable; and in virtue of this subrogation, he would have a right to demand from me, with a deduction of his part, what he may have paid me, since I am, myself, bound for the whole. I could not say, to defend myself against this circuity of actions, that I am no longer a debtor, having paid the creditor; for by means of the subrogation the payment I made has only extinguished the debt, for so much of it as I was myself chargeable with, and not for the surplus: by means of the subrogation, I have rather acquired the creditor's claim for the surplus, than discharged it. But being reimbursed by my co-debtor who would also require the subrogation, this claim for the surplus with the deduction of the part with which he himself is chargeable, would pass to the person of this debtor. It would be no longer I, but he, who would be *procurator in rem suam* of the creditor, and who in this quality would have a right to use against me the actions of the creditor for this surplus and to make me return what he had paid me.

When, after I have paid the whole with ſubrogation, there is among my co-debtors one who is inſolvent, and from whom I cannot recover the part of the debt for which he is liable, this inſolvency ought to be divided between thoſe who are ſolvent and myſelf; equity not permitting that after having paid alone the whole debt, I ſhould alone bear this inſolvency.

§. VI.

Of the actions which the debtor in ſolidum *who has paid without ſubrogation, may have in his own right againſt his co-debtors.*

232. Though a debtor *in ſolidum* has omitted, on paying, to require the ſubrogation, he is not, however, deſtitute of all remedy, and has in his own right, againſt each of his co-debtors, an action to recover the part of the debt with which each of theſe co-debtors is chargeable.

The action is different, according to the different cauſes from which the debt proceeds.

When the debt *in ſolidum* is contracted by ſeveral perſons, for a joint affair; as when ſeveral perſons have bought together a plantation, for the payment of the price of which they bound themſelves *in ſolidum*, or when they have borrowed a ſum of money which they have employed in a common ſpeculation, or which they have divided among themſelves, and they bound themſelves *in ſolidum* to repay it; in this and the like caſes the debtor *in ſolidum* who has paid the whole, has againſt each of his co-debtors the action *pro ſocio*.

He has this action againſt each of them, for the part which each has had in the joint affair that has occaſioned the debt, each of them being liable for the debt for this part.

If one of them was inſolvent, he who has paid the whole has, beſides, an action againſt each of thoſe who are ſolvent, to recover ſo much as each ought to bear of the inſolvent's part; and each is to bear *pro rata* his proportion of that part, according to the ſhare he had in the joint concern. For the inſolvency of one of the partners, is a part-

nerſhip loſs. This loſs, therefore, ought to be born by each partner, in proportion to his ſhare in the partnerſhip.

This will be illuſtrated by an example, *Finge*. Six perſons, Peter, Paul, James, Andrew, John and Thomas purchaſe, together, a quantity of goods, of the value of one thouſand livres, for the payment of the price of which they bind themſelves *in ſolidum* to the ſeller. They divide them among themſelves. Peter takes half on his own account and is charged with one half of the price. The five others divide the other half among themſelves, in equal ſhares. Thomas pays the whole debt without ſubrogation. Andrew is inſolvent. Thomas, who has paid the whole debt, has recourſe againſt his ſolvent co-debtors firſt, for the part with which each was chargeable of the whole debt; viz. againſt Peter for five hundred livres, and againſt Paul, James and John for one hundred each; and further, he will have recourſe againſt each of the ſaid four co-debtors, for the part which each of them ought to bear, on account of the inſolvent debtor, according to the repartition which ought to be made among them, *pro rata*, in proportion to the ſhare which each had in the debt. Thus the part of the debt with which Peter is chargeable, being the quintuple of that with which each of the other debtors is chargeable, he ought, therefore, to bear, of the hundred livres the part of the inſolvent debtor, the quintuple of that which the other ſolvent debtors ought to bear. Therefore this ſum of one hundred livres is to be divided into nine parts, of eleven livres, two deniers and two-ninths. Peter ought to bear five-ninths or fifty-five livres, one ſous. Thomas, who has paid the whole debt, will have a further claim for fifty livres and one ſous againſt Peter, and for eleven livres and two deniers againſt each of the other ſolvent co-debtors, viz. Paul, James and John: and the reſt will be extinguiſhed by confuſion.

When the affair for which the debt was contracted by ſeveral perſons who bound themſelves *in ſolidum*, concerns only one of them; though they are all, with regard to the creditor, principal debtors, yet with regard to them, he whom alone the affair concerned, is the only principal debtor and the others are as his ſecurities. For example. If

Peter, James and John, borrow a ſum of money, which they bind themſelves *in ſolidum* to repay, and Peter retains the whole ſum, Peter is, with regard to his co-debtors, the only principal debtor. If he diſcharges the whole debt, he will have no recourſe againſt his co-debtors, who became debtors with him merely to ſerve him: on the contrary, if James has diſcharged the whole debt, he will have the action *mandati* againſt Peter to claim the whole from him, as a ſecurity has this action againſt the principal, when he, the ſecurity, has paid the whole debt.

But in caſe of Peter's inſolvency, will James who has paid the whole, have an action againſt John to recover the half? This depends on the deciſion of the queſtion, whether the ſecurity has an action againſt his co-ſecurities? See this queſtion, *infra*, *ch.* 6, §. 7, *art.* 4.

When the debt *in ſolidum* has for cauſe a donation, *puta*, when two or three perſons have, by a contract of marriage, given to one a certain ſum, which they bound themſelves *in ſolidum* to pay him, and of which one of them has paid the whole, he cannot in this caſe have for it the action *pro ſocio* againſt the co-debtors: for a partnerſhip may indeed be contracted in purchaſing together and in ſelling together, but not in giving together; partnerſhip being in its nature a contract which is made *lucri in commune quærendi causâ*. The action which he who has paid the whole, has in this caſe againſt his co-debtors, is the action *mandati*: for in this inſtance each of the donors is donor and debtor for himſelf, only for his part; and he is in regard to the ſurplus as a ſecurity and mandatary: he has therefore againſt them for the ſurplus, the action *manduti*, ſuch as a ſecurity has.

When the debt *in ſolidum* proceeds from a tort, *puta*, when ſeveral have been condemned *in ſolidum* for the payment of a certain ſum, the civil reparation of a tort which they have committed together; he who has paid the whole cannot have againſt his co-debtors either the action *pro ſocio* or the action *mandati*: *Nec enim ullâ ſocietas maleficiorum*; L. 1, §. 14, ff. *Tut. & rat. Nec ſocietas aut mandatum flagitioſæ*

rei ullas vires habet; L. 35, §. 2, *contr. empt. Rei turpis nullum mandatum est*; L. 6, §. 3, ff. *mand.* According to the exact principles of the Roman Jurists, the debtor who has paid the whole, has not in this case any recourse against his co-debtors.

According to our practice, which is more indulgent, there is granted in this case to him who has paid the whole, an action against each of the co-debtors, to recover from him his part. See *Papon, liv.* 24, *t.* 12, *n.* 4. This action does not arise from the tort which they have committed together; *nemo enim ex delicto consequi potest actionem:* it arises from the payment which one of the debtors has made of a debt which he owed in common with his co-debtors, and from equity, which does not permit that his co-debtors should profit at his expence by the discharge of a debt for which they were as much bound as he. This is a kind of action *utilis negotiorum gestorum*, founded upon the same principles of equity on which is founded the action that is given in our jurisprudence to the security who has paid, against his co-securities. See *infra, ch.* 6, §. 7, *art.* 4.

CHAPTER IV.

Of some particular kinds of obligations considered with regard to the things which make the object of them.

AMONG the divisions of obligations with regard to the things that are the object of them, which we have noticed *supra, ch.* 1, §. 3, we have said that there were obligations of a certain thing, as to give a certain horse; and obligations of an uncertain and indeterminate thing of a certain kind, *puta*, that to give a horse indeterminately.

We have said also that there were divisible obligations and others indivisible. We shall treat here in a previous section of the obligations of an indeterminate thing of a certain kind; in a subsequent one, of divisible and indivisible obligations.

§. I.

Of the obligation of an indeterminate thing of a certain kind.

283. What is abſolutely indeterminate cannot be the object of an obligation; *supra*, *n.* 138. For example. If I have promiſed you to give you *something*, without ſaying what, there does not reſult from this promiſe any obligation. But one may contract the obligation of an indeterminate thing of a certain kind of things; as when one obliges himſelf to another to give a horſe, a pair of piſtols, without determining what horſe, what piſtols. The individual thing which makes the object of theſe obligations is indeterminate; but the kind in which this individual thing is to be taken, is certain and determinate: theſe obligations are indeterminate *quoad individuum*, though they are, *quoad genus*, a determinate object.

Theſe obligations are more or leſs indeterminate, according as the kind in which the thing is to be taken is more or leſs general. For example. If one has bound himſelf to give me a horſe of a certain breed, the obligation being confined to a horſe of this breed, is leſs indeterminate than if he had bound himſelf ſimply to give me a horſe.

In theſe obligations, each of the things compriſed in the kind in which the thing due is to be taken, is *in facultate ſolutionis*, provided it be good and merchantable; but not *in obligatione*: for there is not indeed, any individual thing of the kind which the debtor may not pay, yet there is none that may properly be demanded from him.

There is indeed one of the things of this kind which is due; for the obligation muſt have an object: but this thing is not any one of the individual things *in concreto*; it is a thing of this kind conſidered *in abſtracto*, by a tranſcendent idea which makes abſtraction of the individuals which compoſe the ſpecies or of the ſpecies compriſed in the genus; it is an uncertain, indeterminate thing which will be determined only by the valid payment which may be made of one of the individual things.

It is true that this thing, thus conſidered, is, until it be determined by the payment, a thing which exiſts only in idea; but we have ſeen *ſupra*, that things which exiſt only in idea may be the object of obligations, obligations being, themſelves, ideal.

This principle, which we give from Dumoulin, *Tract. de Div. & ind. p.* 2, *quæst.* 5, in regard to the object of an obligation of a thing included in a certain kind, appears more juſt and proper than that of thoſe who think that theſe obligations have for their object all the individual things compriſed in the ſpecies or genus, ſo that each of all theſe individuals is due, *non quidem determinate*, but under a ſort of alternative or condition, *si alia res ejus generis non ſolvatur*.

Hence it follows, I. that when a thing of a certain kind is due indeterminately, the creditor is not well grounded in demanding determinately any one of the things compriſed in this kind; but he muſt demand generally and indeterminately one of theſe things.

It follows, II. that the loſs of the things of this kind, which happens ſince the obligation has been contracted, does not fall upon the creditor: for the things which periſh are not thoſe which were due him; and it ſuffices that ſome one of them remains, for the obligation to continue.

Obſerve however, that if the debtor, in order to diſcharge himſelf from his obligation, had offered to the creditor one of the things of this kind, good and merchantable, and had, by a judicial ſummons, put the creditor in arrear to receive it, the loſs which ſhould afterwards happen in regard to this thing, would fall on the creditor, as the debtor ought not to ſuffer from the delay of the creditor, and the debt, indeterminate as it was, has been, by the offer, rendered determinate in the thing offered; L. 84, §. 3, ff. *de Leg.* 1.

284. In regard to the things which the debtor of a thing of a certain kind may validly offer in order to diſcharge himſelf from his obligation, obſerve that it is neceſſary they

ſhould be good and merchantable; *L.* 33, *in fine*, ff. *de Solut.* which is to ſay, that they have no material defect. He who owes a horſe indeterminately, is not admitted to offer a horſe that is blind in an eye, lame, or ſhort-winded, &c. nor one that is very old. Yet, if the thing have no material defect, and the debtor can transfer the irrevocable property in it to the creditor, he may give ſuch a thing of the kind as he pleaſes; *L.* 72, §. 5, ff. *de Solut.*

May he give a thing which could not have been validly promiſed to the creditor towards whom the obligation had been contracted? For example. If I have obliged myſelf to give you a horſe indeterminately, may I diſcharge myſelf from my obligation by giving you a horſe which belonged to you at the time of the contract, and which, having been ſince ſold by you, has become my property? Dumoulin decides for the affirmative; and in this, this obligation differs from that by which I have promiſed a horſe indeterminately under the alternative of another thing; for in this laſt caſe, as my obligation could not exiſt with regard to a thing which belonged to you, there was no other thing due, and conſequently no other thing which I could pay. But in the obligation to give you a horſe indeterminately, no individual horſe being due, and every horſe being *in facultate ſolutionis*, rather than *in obligatione*, it ſuffices that, at the time of payment, the horſe which I give you, to diſcharge myſelf from my obligation, no longer belongs to you, and that it belongs to me, for the payment of the horſe to be validly made to you. This is plainly decided by Marcellus, in the law 72, §. 4, ff. *de Solut.* *Ei qui hominem dari ſtipulatus est, unum etiam ex his qui tunc ſtipulatori ſervierunt dando promissor, liberatur.*

It muſt be admitted, however, that the law 66, §. 3, ff. *de Leg.* 2, which is from Papinian, declares the contrary. *Quum duobus teſtamentis homo generatim legatur; qui solvente altero legatari factus est, quamvis postea sit alienatus, ab altero hærede idem solvi non poterit eademque ratio stipulationis est; hominis enim legatum, orationis compendio singulos homines continet; utque ab initio non consistit in his qui legatarii fierunt,*

ita frustra solvitur cujus dominium postea ..atarius adeptus est, tametsi dominus esse desierit.

Dumoulin, *Tract. de Div. & ind. p.* 2, *n.* 102, according to his cuſtom of making the laws ſubſervient to his deciſions, diſtorts this law. He ſays that the deciſion of this law muſt be confined to the particular inſtance of two legacies made of a thing of a certain kind by two teſtators to the ſame perſon, or of two gratuitous promiſes of a thing of a certain kind, clothed in the form of a ſtipulation, made by two donors to the ſame perſon: that it is by a particular reaſon that in this inſtance the ſame thing which has been paid to the legatee or donee in diſcharge of the firſt legacy or firſt gift, can no longer be paid in diſcharge of the other legacy or gift, *ne scilicet videretur offendi juris regula: Non possunt duæ causæ lucrativæ in eadem re & in eadem persona concurrere:* but that from this law we ought not to make a general deciſion: that in all the obligations of a thing of a certain kind, the things of this kind which, when the obligation was contracted, belonged to him towards whom it was contracted, or which have belonged to him ſince, ought to be preſumed excepted from this obligation, and cannot therefore be paid to him, although they no longer belong to him. Finally, he ſays that in this law theſe words, *hominis legatum, orationis compendio, singulos homines continet*, do not ſignify that all the ſlaves in the world are each *in obligatione legati*, under this condition, *si alias non solvatur;* but that they ſignify only that all the ſlaves in the world are *in facultate solutionis*, and that the legacy may be performed and diſcharged *in singulis hominibus.* This interpretation appears to me contrary to the natural ſenſe of the text. I would rather, in recogniſing a true antinomy between this law and the law 72, as Ant. Faber and Bachovius have done, abandon the deciſion of Papinian, as founded on the falſe principle that the obligation of a thing of a certain kind includes, *alternate & orationis compendio*, that of all the individual things which are ſuſceptible of it, and I would rather adopt the deciſion of Marcellus, in the law 72, §. 4, above cited, for the reaſons before alledged. Cujas, upon theſe laws,

has taken an opinion diametrically oppoſite to that of Dumoulin: and to reconcile what Marcellus ſays, in the law 72, *de Solut.* with what Papinian ſays in the law 66, ff. *de Leg.* 1. he makes an alteration in the text of this law, 66; but the end of the paragraph ſhews the falſity of this innovation in the text, which is beſides without foundation.

285. When the debtor of a thing of a certain kind has paid a certain thing which, through error, he thought was determinately due, he has a right to claim it back, on offering to give another; for having given this thing in payment of his obligation of a thing of a certain kind, only under the falſe perſuaſion that he owed this thing determinately, he has paid what he did not owe; and conſequently *locus est condictioni indebiti*; L. 32, §. 3, ff. *de Cond. ind.*

On the indiviſibility of the payment of obligations of a thing of a certain kind, ſee *infra, Part* 1, *ch.* 1, *art.* 6, §. 3.

286. Whether the obligation be *generis generaliſſimi*, as when one has obliged himſelf to give a horſe, generally; or whether the obligation be *generis ſubalterni, aut generis limitati*, as when one has obliged himſelf to give one of his horſes; all we have hitherto ſaid applies, provided the agreement does not contain any clauſe which takes away the choice from the debtor.

But when by a particular clauſe in the agreement, the choice is granted to the creditor; as when one has obliged himſelf to give me one of the dogs of his kennel at my choice; in this caſe, although the agreement includes principally the abſolute obligation to give a dog indeterminately, yet it may alſo be ſaid that in virtue of the clauſe which grants me the choice, each of the dogs of the debtor's kennel is due me under a ſort of condition, which is the choice I may make; ſince in virtue of this clauſe there is no one of them which I may not require. Therefore the debtor is in this caſe bound to keep them all for me until I may make my choice; he cannot until this, without contravening his obligation, diſpoſe of any of them. *Arg.* L. 3, *Qui & a quib. man. Si indistincte homo sit legatus, non potest*

hæres, quosdam manumittendo, evertere jus electionis; nam quodammodo singuli sub conditione legati videntur.

It cannot be said in the same manner, when the debtor has the choice, that each individual is comprised in the obligation, in case the debtor chooses to give one rather than another; for it is not in the faculty to pay one thing rather than another, but in the right to require it, that the obligation consists. This is the difference which Dumoulin establishes, *Tract de Div. & ind part.* 2, *n.* 112, 113, 114, between the case in which the choice is given to the creditor and the case in which it is given to the debtor.

SECTION THE SECOND.

Of divisible and indivisible obligations.

ARTICLE THE FIRST.

What obligations are divisible, and what are indivisible.

§. I.

What is a divisible obligation and what an indivisible obligation.

287. A divisible obligation is that which may be divided: an indivisible obligation is that which cannot be divided. An obligation is not the less divisible though it be actually undivided; for it suffices, to be divisible, that it *may* be divided. *Molin. Tract. de Div. & ind. part.* 3, *n.* 7, *& seq*

For example. When I have alone contracted the obligation to pay you the sum of one thousand crowns, this obligation is undivided; but it is divisible, because it may be divided, and will in fact divide itself between my heirs, if, dying before I have discharged it, I leave several heirs.

Likewise, the obligation *in solidum* which several persons contract to pay to some one ten crowns, is, not the less, a divisible obligation. The effect of the liability *in solidum* is that it be not actually divided between the debtors *in solidum*; but their obligation is no less a divisible obligation, because it may be divided, and will in fact be divided among their heirs.

288. It is neceſſary to enquire what obligations may be divided, and what may not be divided.

An obligation may be divided and is diviſible, when the thing due which makes the object and ſubject of it, is ſuſceptible of diviſion, and of parts in which it may be paid; and on the contrary, the obligation is indiviſible and cannot be divided, when the thing due is not ſuſceptible of diviſion and of parts, and can be paid only in the whole.

The diviſion which is here in queſtion is not a phyſical diviſion, which conſiſts *in solutione continuitatis*, as that of a board which is ſawed into two; but it is a *civil* diviſion, and proper to the commerce of things.

There are two kinds of civil diviſions; one which is in actual and divided parts, and another which is in parts ideal and indiviſible. When an acre of land is divided into two parts, by erecting a fence acroſs, it is a diviſion of the firſt kind: the parts of this acre which are ſeparated from each other by the fence, are actual and divided parts.

When the owner of this acre of land, or other thing, dies and leaves two heirs who become owners each of an undivided half, this is a diviſion of the ſecond kind: the parts which reſult from this diviſion and which belong to each of the heirs, are undivided parts which are not actual and which exiſt only *in jure & intellectu*.

The things which are not ſuſceptible of the firſt kind of diviſion are not the leſs ſuſceptible of the ſecond. For example. A horſe, a ſilver plate, are not ſuſceptible of the firſt kind of diviſion; for theſe things are not ſuſceptible, without the deſtruction of their ſubſtance, of actual and divided parts; but they are ſuſceptible of the ſecond kind of diviſion, becauſe theſe things may belong to ſeveral perſons in undivided parts.

It ſuffices that a thing be ſuſceptible of this ſecond diviſion, although it be not of the firſt, for the obligation, to give this thing, to be a diviſible obligation. This reſults from the law 9, §. 1, *de Solut.* where it is ſaid, *Qui Stichum debet, parte Stichi data, in reliquam partem tenetur.* Accord-

ing to this text, the obligation to give the ſlave Stichus is a diviſible obligation, ſince it may, at leaſt by conſent of the creditor, be diſcharged in part, although the ſlave is not ſuſceptible of the firſt kind of diviſion; *Molin. ibid. p.* 1, *n.* 5, *p.* 2, *n.* 200 & 201.

Indiviſible things are thoſe which are not ſuſceptible either of actual parts or even of ideal parts: ſuch are certain incorporeal hereditaments, *quæ pro parte acquiri non possunt.*

The obligation to give a thing of this nature, is an indiviſible obligation; *Molin. p.* 2, *n.* 201.

289. The ſame rule which we have juſt given to determine whether obligations *in dando* are diviſible or indiviſible, muſt alſo ſerve in regard to obligations *in faciendo vel in non faciendo.* Several writers have thought that theſe obligations were indiviſible, without diſtinction; but Dumoulin, *ibid. p.* 2, *n.* 203, & *seq.* has ſhewn that they are no leſs diviſible than obligations *in dando*, unleſs the act which is the object of them be of ſuch a nature as that it cannot be performed in parts, as when I have obliged myſelf to build a houſe, &c. But if the act which is the object of the obligation may be performed in parts, as if I have obliged myſelf to put you in poſſeſſion of a thing which may be poſſeſſed in parts, the obligation will be diviſible. This is the fifth key of Dumoulin: *Omnis obligatio etiam facti dividua est, nisi quatenus de contrario apparet. Molin. ibid.* & *p.* 2, *n.* 112.

Likewiſe, the obligation *in non faciendo* will be diviſible, when what I have obliged myſelf not to do, may be done in one part and not done in another part: ſuch is the obligation *amplius non agi ad aliquid dividuum;* as when I have bound myſelf to you not to diſturb the poſſeſſor of an eſtate which you have to warrant and defend; this is an obligation *in non faciendo*, which is diviſible; for it may be diſcharged in part. I may contravene it in part, by claiming a part only of this eſtate, and diſcharge it in part by forbearing to claim the other part.

290. Obſerve that is the very thing or act which makes the object of the obligation, that muſt be conſidered in order

to decide whether the obligation is divisible or indivisible, and not the benefit which the creditor might derive from the obligation contracted to his advantage, nor the detriment, *onus & diminutio patrimonii*, which would result therefrom to the debtor; otherwise there would be no obligation which might not be divisible.

Therefore, for example, if two joint proprietors of a house have obliged themselves to the two joint proprietors of an adjoining house, to grant a right of view for the benefit of this adjoining house, this obligation is indivisible; because the right of view which makes the object of it, is something indivisible, although the benefit which results therefrom to each of those to whom the obligation is contracted, and the detriment to be sustained by each of those who contracted it, may be valued in a sum of money which is divisible. This is shewn by Dumoulin, *ib. p.* 2, *n.* 199: *Cum hic effectus*, he says, *sit quid remotum & separatum a substantia obligationis & rei debitæ, non dicitur obligatio dividua vel individua penes effectum, sed secundum se & secundum naturam rei immediate in eam deductæ.*

§. II.

Of the different kinds of indivisibility.

291. Dumoulin, *ib. p.* 3, *n.* 57, & *seq.* & *n.* 75, distinguishes very properly three kinds of indivisibility; that which is absolute, and which he calls *individuum contractu*; that which he calls indivisibility of obligation, *individuum obligatione*; and that which he calls indivisibility of payment, *individuum solutione.*

The absolute indivisibility, which Dumoulin calls *individuum contractu*, is when a thing is in its nature not susceptible of parts, so that it could not be stipulated or promised in part: such are, as before observed, certain incorporeal hereditaments, as for example, a right of way. It is impossible to have an idea of the parts in a right of way; and consequently one could not stipulate or promise this kind of things in part.

292. The second indivisibility is that which Dumoulin

calls *individuum obligatione*. Whatever is *individuum contractu*, is so *obligatione*: but there are certain things, which, although they may be absolutely stipulated or promised in parts, and consequently though they be not *individua contractu*, yet from the manner in which they have been considered by the contracting parties, are something indivisible, and which cannot, consequently, be due in parts.

We may adduce as an example of this indivisibility, the obligation to build a house or ship. This obligation is not indivisible *contractu*; for it is not impossible that it should be contracted in parts. I may agree with a mason that he shall construct a part of the house which I intend to build, *puta*, that he shall carry it up to the first floor. But although the building of a house be not indivisible *contractu*, it is, ordinarily, indivisible *obligatione*: for when one contracts with a builder to build a house, the building of the house, which makes the object of the obligation, is, from the manner in which it is considered by the contracting parties, something indivisible, and *quod nullam recipit partium præstationem*. It is true that this building can only be done by parts and successively; but it is not the building of the house which makes the object of the obligation; it is the work itself completed, it is *domus construenda*. As there cannot then be a house until it be entirely built, as the form and quality of the house can result only from the completion of the work, and as there cannot be parts of what does not yet exist, it follows that the obligation to build a house, can be performed only by the building of the house completed, and consequently that this obligation is not susceptible of parts, and cannot be performed in parts. This is the meaning of the commentator in the law 80, §. 1. ff. *ad leg. Falcid.* in which, in order to prove that the obligation to construct a work, as a theatre, a bath, is indivisible, he alledges the reason: *Neque enim ullum balneum, aut theatrum, aut stadium fecisse intelligitur, qui ei propriam formam quæ ex consummatione contingit, non dederit.*

For the same reason it is said in the law 85, §. 2, ff. *de*

Verb. obl. that the obligation to construct a work is indivisible: *Singuli hæredes in solidum tenentur, quia operis effectus in partes scindi non potest. Opus*, says Dumoulin, *fit pro parte realiter & naturaliter: sed si illud opus* FIERI *referas ad effectum præstationem ejus quod debetur, tunc verum non erit per partes fieri quia parte fabricæ facta, non est debitor liberatus in ea parte: simplex enim fabricatio & operatio transiens non debetur, sed opus effectum, cujus pars non est fabricæ pars, cum nullæ sint partes domus quæ nondum est; nec sum stipulatus fabricam, sed fieri domum, id est tale opus, sub tali forma consummatum, quod ante perfectionem non subsistit, nec ullas actu partes habet. Molid, Tract. de Div. & ind. p.* 3, *d.* 76. We may further adduce here the law 5, ff. *de Verb. signif.*, which says *opere locato conducto significari non* OPUS, *id est operationem, sed* EFFECTUS, *id est ex opere facto corpus aliquod factum.*

Certain circumstances under which the obligation of a thing is contracted, may also render the obligation indivisible, although the thing in itself and detached from these circumstances, be indeed divisible. Such is the obligation which I might contract to furnish a person with a piece of ground for a wine-press which he is about to erect: for although the ground which I have promised is a thing in itself divisible, yet it being due, not as a piece of ground *simpliciter*, but as a piece of ground designed for a wine-press, it becomes, in this view, something indivisible, since no part can be taken from it without its ceasing to be proper for the purpose, and without its ceasing consequently to be the thing which makes the object of the obligation; *Molin. p.* 2, *n.* 314, 293.

293. The obligation indivisible *natura & contractu*, is the obligation of a thing which in itself, from its nature, and in whatever manner it may be considered, is not susceptible of parts: the obligation indivisible *obligatione*, is the obligation of a thing which, considered in the respect in which it makes the object of the obligation, is not susceptible of parts.

It is evident that these obligations which are indivisible, whether *contractu* or *obligatione*, are likewise so *solutione*; so

that cannot be paid in parts which is not susceptible of parts.

294. There is a third kind of indivisibility, which is called *individuum solutione tantum*. It is that which relates only to the payment of the obligation, and not to the obligation itself, when the thing due is in itself divisible and susceptible of parts, and may be due in parts, whether to the different heirs of the creditor, or by the different heirs of the debtor, but cannot be paid in parts.

We shall adduce several examples of this kind of indivisibility in the following article, in which we shall treat of the nature and effects of divisible obligations, to which class properly belong the obligations in which is found this kind of indivisibility, since it does not relate to the obligation itself, although, however, the law 2, §. 1, ff. *de verb. oblig.*, would make of them a mixed kind, partaking of the nature of obligations divisible and indivisible.

§. III.

Some particular kinds of obligations in regard to which it is asked whether they are divisible or indivisible.

Of the obligation to deliver a piece of land.

295. The obligation to deliver a piece of land, *fundum tradi*, is a divisible obligation; for this delivery may be made in parts; a part of this piece of land may be delivered. The act which makes the object of this obligation being then divisible, it cannot be doubted that, according to the principle we have just established, this obligation is divisible. Our decision is confirmed by texts of law; for although the obligation of a borrower is the obligation to return the thing borrowed, *obligatio rem tradi*, yet the law 3, §. 3, ff. *Commod.*, decides that his heirs are regularly bound for the part only for which they are heirs, which is the character of divisible obligations: *Hæres ejus qui commodatum accepit, pro ea parte quæ hæres est, convenitur.* It is true that this obligation of the borrower, although divisible *quoad obligationem*, is indivisible at least *quoad solutionem*: but examples may easily be given of obligations *tradi rem*, *fundum tradi*,

which are divisible even *quoad solutionem*. Such is that which Dumoulin gives, *p.* 2, *n.* 305. I compound with a person who has brought suit against me for a certain piece of land, and I bind myself by this composition to abandon it to him without any warranty on my part. This obligation, which is an obligation *fundum tradi*, is divisible even *quoad solutionem*; and if I die before the delivery, and leave four heirs, each of my heirs will discharge himself from this obligation by abandoning the part of the land which has descended to him.

The law 72, ff. *de verb. oblig.*; appears, however, to be diametrically opposite to our decision; for the obligation *fundum tradi* is there adduced in formal terms as an example of an indivisible obligation, with the obligations *fossam fodiri, insulam fabricari, vel si quid simile*, which are indivisible, *tam obligatione quam solutione*. Dumoulin, *p.* 2, *n.* 278, *ad. n.* 359, after having adduced the different opinions of several writers to reconcile this law, adduces his own, to which it is proper to adhere. He thinks with reason that this example of the obligation *fundum tradi* ought not to be understood, without distinction, of every obligation by which one has obliged himself to deliver a piece of land, but only of the obligation to deliver a piece of land, with circumstances which render the obligation indivisible; as, for example, if wishing to build myself a house, and not having any proper place for my materials and conveniences, I agree with my neighbour that he shall give me the use of a piece of ground which he has adjoining my house, to serve me for this purpose: this obligation is an obligation *fundum tradi, non simpliciter, sed ad certum usum finemque principaliter consideratum in contrahendo*: and this purpose renders indivisible this obligation *fundum tradi*; for an obligation is indivisible when that which makes the object of it is not susceptible of a partial performance, *cum id jus quod in obligationem deductum est, non nisi in solidum præstari potest*; which is the case in the present instance: for this piece of ground being to be furnished me for a particular purpose, it can be furnished for this purpose only in the whole, since a part would

not be ſufficient and could not ſerve the purpoſe for which it is to be furniſhed me. Dumoulin gives other examples, 312, 313, 314, 315.

Of the obligation of a day's work.

296. The obligation of a day's work is indiviſible, in the ſame manner as the obligation to build a houſe: for although the labour of a day's work be not in itſelf a thing indiviſible, yet the obligation is contracted as of a thing indiviſible, and which cannot be diſcharged in part. Therefore Ulpian ſays: *Nec promitti, nec ſolvi, nec deberi, nec peti pro parte poterit opera*; L. 15, ff. *de Oper. libert.*

Likewiſe, Pomponius, in the law 3, §. 1, ff. *de Oper. libert.* decides that the labour of a day's work cannot be diſcharged in parts, as for a certain number of hours; and that conſequently the debtor of a day's work who had worked until noon and retired, would not in any manner have diſcharged his obligation and would ſtill remain debtor of the day's work: *Non pars operæ per horas ſolvi potest, quia id est officii diurni; neque ei liberto, qui ſex horis duntaxat meridianis præſto fuiſſet, liberatio ejus diei contigit.* But after he has performed the day's work of which he remained debtor, he may demand the price of his half-day's work which he did not owe.

Dumoulin, *p.* 2, *n.* 355, *& ſeq.* remarks very juſtly that this indiviſibility of the obligation of a day's work is only an indiviſibility *obligatione* and not an abſolute indiviſibility, or indiviſibility *contractu*; for nothing prevents the obligation from being contracted for a part of a day's work, as for half of a day. It is true that the law 15, §. 1, *de Oper. libert.* ſays, *Nec promitti pro parte opera potest:* but this is a mere ſubtilty. The Juriſt takes *opera* for *officium diurnum*, as by the definition in the law 1, ff. *d. tit*, which it regards, according to this idea, as indiviſible; ſince if you divide it, it is no longer *officium diurnum*: it is *officium horarium.*

Of the obligation to do a piece of work.

297. We underſtand here by work, *effectio transiens*

opus specificum permanens, according to the expreſſion of Dumoulin, *p.* 2, *n.* 361; and we have already ſeen *ſupra*, *n.* 292, that the obligation to do a piece of work taken in this ſenſe, ſuch as the obligation to build a houſe, to make a ſtatue, a picture, is an indiviſible obligation, not of that abſolute indiviſibility which we have called, with Dumoulin, indiviſibility *contractu*, but the ſimple indiviſibility *obligatione*.

Of the obligation to pay a certain sum of money bequeathed for the building of a hospital or for some other purpose.

298. The obligation which reſults from ſuch a legacy is diviſible, ſince it is an obligation to give a ſum of money. What is added in the teſtament to *build a hospital*, expreſſes only the motive which the teſtator had to make this legacy; it is *ratio legandi*: but this motive, not being united to the diſpoſition, *ratio legandi non cohæret legato*, L. 72, §. 6, ff. *de Cond. & dem.* cannot conſequently have any influence on the nature of the legacy, nor on the obligation which reſults therefrom.

If the teſtator had charged his heirs to build a hoſpital in a certain city, and to employ for this purpoſe a certain ſum of money; the obligation, which would have for its object the building of the hoſpital, would be indiviſible. It is to this laſt inſtance that the law 11, §. 23, ff. *de Leg.* 3, muſt be applied. See *Dumoulin*, *p.* 2, *n.* 368 *& seq.*

ARTICLE II.

Of the nature and effect of divisible obligations.

§. I.

General principles.

299. An obligation is called *divisible*, as we have already remarked, not becauſe it is actually divided, but becauſe it may be divided. Therefore, however diviſible the thing due may be, the obligation, before the thing has been divided, is indiviſible, and cannot be diſcharged in parts, as we ſhall ſee, *infra*, *Part.* 3, *ch.* 1. *art.* 5, §. 2.

It is neceſſary then to be careful not to confound what is undivided with what is indiviſible. This is the firſt key

of Dumoulin, *Tract. de Div. & ind. p.* 3, *n.* 7, *& seq. n.* 112.

This diviſion of the obligation takes place on the ſide of the debtor or on that of the creditor, or ſometimes on both together. The obligation is divided on the ſide of the creditor, when he leaves ſeveral heirs. Each of the heirs is creditor only for his part: whence it follows that he can exact the debt only for this part, unleſs he has authority from his co-heirs to receive their parts. From this it likewiſe follows that the debtor may pay ſeparately to each of theſe heirs the parts which are reſpectively due them.

The obligation is divided likewiſe on the ſide of the debtor, when he leaves ſeveral heirs: each of the heirs of this debtor is liable for his part only of the debt and, ordinarily, each of the heirs may oblige the creditor to receive the debt for this part.

§. II.

Modifications of the firſt effect of the diviſion of the obligation on the ſide of the debtor.

300. The principle which we have eſtabliſhed, that in diviſible obligations each heir of the debtor is liable only for his part of the debt receives ſeveral exceptions and modifications.

The firſt is in regard to debts with hypothecation. In this caſe, when the heirs of the debtor are in poſſeſſion of real eſtate hypothecated for the debt; although the debt is divided between them, and they are therefore liable to the perſonal action which reſults from the obligation of the deceaſed, only for the part for which they are heirs; yet they may be proſecuted for the whole of this debt, as the poſſeſſors of the eſtate hypothecated to ſecure it. See what we have ſaid on this ſubject, in our *Introduction au tit.* 20, *Cout. d'Orleans, ch.* 1, *sect.* 3.

301. The ſecond is in regard to debts of a certain and determinate thing which the deceaſed has left among other things of his eſtate. When the deceaſed has left heirs of different kinds, thoſe who take his acquired property, and thoſe who take that which has deſcended to him, they are

not all liable for the debt of this determinate thing; the heirs only of the patrimony, of which it makes a part, are liable for it. The reaſon is that the anceſtor would not himſelf be liable for it, were he ſtill living, unleſs he continued to poſſeſs it, or had ceaſed by his own act or fault, to poſſeſs it. His heirs who ſucceed to the eſtate of which the determinate thing does not make part, who have therefore never poſſeſſed it, cannot therefore be liable for the debt of this determinate thing, as they could only be liable in the manner in which the deceaſed whom they repreſent would have been; the heirs therefore of the patrimony, of which the determinate thing makes part, can alone be liable for it.

But if, by the diviſion between the heirs of this patrimony, this determinate thing due by the deceaſed, has fallen to the lot of one of them, the others would not therefore be diſcharged from the debt, even though they have charged the one to whom the determinate thing has fallen, with the payment of the debt when it ſhould become demandable: for having been once liable for this debt, they could not by their own act, in compriſing this determinate thing in the maſs of property which they have divided, diſcharge themſelves from the obligation to deliver it to the creditor.

302. The third modification is alſo in regard to debts of a certain and determinate thing. Although the debt of a determinate diviſible thing, divides itſelf between the heirs of the debtor who ſucceed to the kind of eſtate of which it makes a part; and although, after the diviſion by which the determinate thing has fallen to the lot of one of them, each of theſe heirs continues debtor for his part, as we have juſt ſeen *supra*; yet he to whom it has fallen, may be proſecuted for the payment of the whole, provided his co-heirs are made parties to the ſuit, or, if not, provided he had been charged in the diviſion with the payment of the debt.

The reaſon which Dumoulin renders for this is that, although the action which ariſes from this debt be divided againſt each of the heirs of the debtor, yet as the execution

muſt be made for the whole againſt him who has become, by the diviſion, the ſole poſſeſſor of the thing, it follows that he may be condemned to the delivery of the thing in the whole; *quia quamvis actio mere sit personalis, tamen executio judicati in rem scripta est, & divisio non debet impedire vim futuri judicii, nec executionem in rem & in ejus possessorem, salvo contra hæredes recursu ; Molin, p. 2, n. 84.*

This deciſion applies when it is in his quality of heir, and by the diviſion of the eſtate, that this heir of the debtor for a part of the eſtate, has come to poſſeſs the thing due entire. It would be otherwiſe if it were in his own right that he poſſeſſed it; he would not in this caſe be the debtor of it, and he could only be condemned to pay the part for which he is heir. An argument in ſupport of this may be derived from the law 86, § . 3, ff. *de Leg.* 1, *si fundus ab omnibus hæredibus legatus sit, qui unius hæredis esset ; is cujus fundus esset, non amplius quam partem suam præstabit, cæteri in reliquas partes tenebuntur.*

We have juſt ſeen that when the heir for part of the eſtate of a debtor of a determinate thing, comes, in this quality of heir, to poſſeſs the thing entire, he may be condemned to the payment of the whole, provided his co-heirs be parties to the ſuit, according to Dumoulin, *ib. n.* 84. This author goes much further, *ib. p.* 3, *n.* 242 ; for he decides that the heir may be condemned to this, even without making his co-heirs parties to the ſuit, when it is evident they could not have any defence. This is decided in the inſtance of a ſeller, who having ſold a thing to be delivered in one month, and having received the price, died during the time, leaving ſeveral heirs : he decides that the ſale and the payment of the price being admitted, the heir in whoſe poſſeſſion the thing is, ought, after the expiration of the time, to be condemned to deliver it, without making his co-heirs parties.

303. The fourth modification is when the debt conſiſts in the ſimple reſtitution of a thing which belongs to the creditor and is only detained by the debtor. Although the

thing be divisible, and consequently the debt also, yet the heir of the debtor with whom the thing is, is alone liable for the restitution. For example; if one has lent or deposited with you a library, although this debt be divisible, the heir in whose possession it may be, will be liable for the restitution of this library in the whole: *Hæres ejus qui commodatum accepit, pro ea parte qua hæres est, convenitur, nisi forte habuit totius rei facultatem restituendæ, nec faciat; tunc enim condemnatur in solidum, quia hoc boni judicis arbitrio conveniat;* L. 5, §. 3, ff. *Commod.*

The reason is, that as this heir who has the possession of the thing entire, has it in his power to restore it, and has no need for this purpose to wait for the consent of his co-heirs, who have no right in the thing, and to whom the restitution which he may make, cannot be otherwise than advantageous, by discharging them from the obligation in which they are also to restore it; good faith does not permit him to refuse this restitution.

This is intended by the words, *quia hoc boni judicis arbitrio conveniat.* If this heir is liable only for the part for which he is heir, *ex prima and primitiva obligatione depositi aut commodati, quæ dividua est,* he is liable for the whole of this restitution which is in his power, *ex obligatione accessoria præstandi bonam fidem,* the obligation of good faith being an indivisible obligation; *neque enim bona fides potest præstari pro parte.* This is also one of the keys of Dumoulin: *Lex* 12 *tabularum,* he says, *non dividit obligationes, etiam dividuas, quatenus respiciunt bonam fidem; unde obligatio etiam dividua, ad officium bonæ fidei obligat in solidum, concurrente facultate præstandi, & quatenus concurrit, & quemdocumque hoc contigerit, Molin, p.* 3, *n.* 112.

304. A fifth modification is that the heir by whose act or fault the thing has perished, is liable for the whole of the debt. The reason is derived from the principle of Dumoulin, that the principal obligation *rem dividuam dandi,* is indeed divisible; but that the accessory obligation *præstandi bonam fidem & diligentiam,* which accompanies it, is indivisi-

ble. Each of the heirs is in this reſpect bound *in ſolidum ; nec enim pro parte diligentia præſtari potest :* whence it follows that the heir who has failed in this, and by whoſe act or fault the thing has periſhed, ought to be liable for the whole. According to theſe principles, if a perſon has bound himſelf to ſuffer me to enjoy an eſtate, either by a leaſe or a ſale of the uſe of it, and he has left four heirs ; if one of the heirs, without having any title to this eſtate in his own right, unjuſtly diſturbs me in the enjoyment of the whole of this eſtate, he will be liable for the whole damages, and not for part only in the proportion in which he is heir : for although the principal obligation, to ſuffer me to enjoy, be diviſible, the acceſſory obligation *præſtandi bonam fidem*, which is not to oppoſe any diſturbance, is indiviſible, and paſſes conſequently to each of the heirs in the whole ; thus the heir who contravenes it ought to be liable for the whole damages.

From this principle, that an heir cannot indeed be ſued for a diviſible debt, for more than the part for which he is heir, when he is ſued in his ſole capacity of heir and for the act of the anceſtor, but that he may be ſued for the whole when he is ſued for his own act : *multum refert unum hæredum debitoris teneri ſecundaria obligatione ut hæredem tantum, id eſt ex facto, vel non facto defuncti tantum ; an vero ut ipsum, id eſt ex suo facto proprio vel non facto ; Molin, p. 3, n. 5.*

305. In regard to the other heirs who have not concurred by any act or fault of theirs, in the loſs of the thing due, they are diſcharged ; for this heir is liable for the debt, in the ſame manner as the anceſtor was. The anceſtor would have been diſcharged by the loſs of the thing due which had happened without his fault ; the heir therefore ought likewiſe to be diſcharged by the loſs of the thing which has happened without the fault of the anceſtor or his own. The heir is indeed liable for the acts of the anceſtor, ſince he ſucceeds to his obligations ; but he is not liable for the act of his co-heirs. This is decided by the law 9 & 10, ff, *Depos. In depositi actione, si de facto defuncti agatur, adversus unum ex pluribus hæredibus pro parte hæreditaria*

agere debeo; si vero ex suo delicto, pro parte non ago; merito, quia estimatio refertur ad dolum quem in solidum ipse admisit, nec adversus coheredes qui dolo carent, actio competit. Paul decides the same thing in the loan to use; L. 17, §. 2, *Commod. Molin. p.* 3, *n.* 439 & 440.

If a penalty had been stipulated in case the thing should not be restored; in this case, although it had perished by the fault of one of them, and without the act or fault of the others, they would, not the less, be liable for the penalty, for their respective parts. For the obligation to pay the sum stipulated in the penalty, is a second obligation which the ancestor contracted, and which is conditional; it has for condition the inexecution of the first.

The heirs of the deceased have each, to the amount of the part for which they are heirs, succeeded to this second obligation under the same condition: they are therefore liable, each for their part in the estate, to pay this sum on the accomplishment of the condition, which is to say, in case the first obligation be not performed, whether by the act or fault of the ancestor, or by that of one of his heirs; saving their recourse against the heir by whose act or fault the thing has perished. This is taught by Dumoulin, who says that the co-heirs of him by whose act the thing has perished, are liable in this case for the penalty, *non immediate ex facto & culpa dolosi, sed ejus occasione & tanquam ex eventu conditionis, ex obligatione defuncti quæ in eos sub ea conditione descendit;* Molin. *d. n.* 443.

This is the case which Paul intends to speak of in the law 44, §. 6, ff. *Fam. ercisc.*, when he says, *Si reliqui propter factum unius teneri cæperint, tanquam conditio stipulationis hæreditariæ extiterit habebunt familiæ erciscundæ judicium cum eo propter quem commissa sit stipulatio.*

Observe that in order that the contravention by one of the heirs may prejudice the others, it is necessary that there should have been a second express agreement; by which the ancestor bound himself for the payment of a certain penalty in case of the inexecution of the principal obligation,

or by which he bound himself for the damages in case of a contravention by himself *or his heirs*. But it does not suffice that it be said at the end of the instrument that the parties have all bound themselves for its contents under the penalty of all costs and damages; for this clause does not include a second obligation: *Hæc clausula nihil novi addit, cum sit ex stylo communi ad confirmandam tantum, secundum materiam subjectam, & ejus limites; ib.* 442.

It will perhaps be said against the distinction of Dumoulin, that in all agreements which contain a principal obligation, a second obligation must always be implied as accessory to the first, by which the debtor binds himself for the damages in case of a contravention, by himself or by his heirs, of the principal obligation; that this second implied agreement must have the same effect as if it had been expressed. The answer is that it is not true that this second agreement ought to be implied when it is not expressed. If the debtor who contravenes his principal obligation, is liable for the damages resulting from his contravention, it is not from any second implied agreement by which he submitted to these damages; it is solely becaufe this obligation of damages is included in the principal obligation, and this principal obligation, *ex propria naturâ*, is converted, against the debtor, into an obligation of damages. But in this case, when it is one of the heirs of the debtor, who has contravened the obligation, the other heirs who have not contravened it, are not liable for any damages; these heirs being liable indeed for the acts of their ancestor and for their own but not for those of their co-heir, as we have before observed.

306. When the thing has perished by the act or fraud of several of the heirs, each of them is liable *in solidum*: *Nec enim*, says Dumoulin, *qui peccavit, ex eo relevari debet, quod peccati habet consortem.*

If, however, these heirs had, each by a particular act, destroyed or diverted different parts of the thing due, each would be liable only for the particular loss which he occasioned; for in this case, *unusquisque non in solidum, sed in*

parte duntaxat dolum admisit; this is what Marcellus decides in the law 22, §. *Deposit. Si duo hæredes rem apud defunctum depositam dolo intervenerint, quodam casu in partes duntaxat tenebuntur; nam si diviserunt decem millia, quæ apud defunctum fuerant, & quina millia singuli abstulerint, & uterque solvendo est, in partes adstricti erunt: quod si quæ species dolo eorum interversa fuerit, in solidum convenire poterunt; nam certe verum est in solidum quemque dolo fecisse.*

Observe in regard to the first instance in the law 22, that it is said, *si uterque solvendo est*; for if one of the two heirs had been insolvent, the one who was solvent, would have been in fault, not only with regard to his half, but even with regard to the other half, as he ought not to have divided the sum given to the ancestor in deposit, with his insolvent co-heir. If the obligation to restore the sum was a divisible obligation, the accessory obligation to keep and preserve it with good faith, was an indivisible obligation, for the whole of which each was liable, and which the solvent heir has contravened, not only with regard to the half which he ought to have paid, but also with regard to the other half which he abandoned to his insolvent co-heir.

307. A sixth exception is that, although an obligation be divisible, one of the heirs of the debtor may be chargeable with the whole, either by an agreement, or by the testament of the deceased who may have so charged him, or by the act of the Judge who makes the division of the estate. In all these cases, one of the heirs is liable for the whole of the debt, without the other heirs ceasing to be liable each for their part.

308. There results from all these modifications, *ut aliud est unum ex pluribus sive principalibus sive hæredibus teneri in solidum, aliud obligationem esse individuam.* This is the third key of Dumoulin, *part.* 3, *n.* 112.

309. Excepting these cases, each heir of the debtor is liable for divisible debts only in the proportion in which he is heir; and he is not liable even subsidiarily for the surplus, in case of the insolvency of his co-heirs. The law 2, *Cod. de*

Herid. act., which decides that each heir is liable only for his part of the debts of the anceſtor, does not diſtinguiſh whether all the heirs are ſolvent or not. It is derived from the very idea of an heir, who is one that ſucceeds to the rights active and paſſive, which is to ſay, the debts and obligations of the anceſtor. He who is heir for a part only, ſucceeds only for this part; he is therefore chargeable only with this part. The inſolvency of his co-heirs which happens, does not render him ſucceſſor to all the rights of the anceſtor; he continues heir for his part only and conſequently ought to be liable only for his part of the debts.

It is ſaid that as the debts are a charge upon the eſtate, they ought to be diſcharged in the whole, from the eſtate which this heir for part retains. The anſwer is, that the whole of the eſtate is charged with the whole of the debts; but the parts of this whole of the eſtate are charged only with the like parts of the debts. It is inſiſted, that if the debtor had diſſipated the half of his eſtate, the other half which ſhould remain, would be chargeable with the whole of the debts: therefore when one of the heirs of the debtor has diſſipated his half, the other half, which belongs to the other heir, ought likewiſe to be charged with the whole of the debts. I deny the conſequence. When the debtor has diſſipated the half of his eſtate, that which remains is the whole eſtate of the perſon bound for the whole of the debts, and conſequently the whole of the debts is a proper charge on what remains of the eſtate; but when my co-heir has diſſipated the half which has fallen to him, that which I have is only the portion of an heir for half, who is perſonally liable for the debts to the amount of this half: this portion ought not therefore to be charged with more than the half of the debts. It is further inſiſted that the creditor ought not to ſuffer from the number of heirs the debtor leaves: therefore the diſſipation of half of the eſtate, by one of the heirs, ought not to ſubject him to loſe the half of his debt; ſince if the debtor or his ſole heir had deſtroyed the half of the eſtate, the creditor would loſe nothing of his debt. The anſwer to this is, that it is only *ex accidenti* that

the creditor ſuffers in this caſe from the number of heirs which the debtor leaves: he might have avoided any loſs, by attaching the eſtate before the diviſion, or otherwiſe uſing more diligence in cauſing himſelf to be paid.

This deciſion, that the heir for part is not liable for the debts for the parts of his co-heirs who have become inſolvent, although his part ſhould be more than ſufficient to pay the whole, being derived from principles of natural reaſon and from the nature of the very quality of an heir, it ought to apply in *foro conscientiæ* as well as in *foro legis*; *Molin. part.* 2, *n.* 82.

310. This principle, that an heir is not liable for the inſolvency of his co-heirs, admits of ſeveral exceptions. The firſt, which is attended with no difficulty, is when it is by the act and fraud of one heir that the creditor has not been able to cauſe himſelf to be paid by the other heirs who have become inſolvent; *puta*, when this heir has pretended to be the ſole heir. *Molin. ib. n.* 85, *in fine.*

Dumoulin adduces a ſecond exception, which is, when a father ſhould leave two ſons his heirs, one of whom had waſted beforehand what he received of the eſtate in advancement, and to whom, by reaſon of the account he would have to render, there would come, of the active property of the eſtate of the father, much leſs than the part of the debts of this eſtate for which he would be liable in acceding to the ſucceſſion. The other ſon ought to anſwer in this caſe to the creditors of the eſtate for the part of the debts for which his inſolvent brother is liable, although the creditors have not had the precaution to attach the property of the eſtate before the diviſion. The reaſon is, that as this ſon has received almoſt all the active property of the eſtate of the deceaſed, by means of the account which his brother had to render for what he received in the life-time of the father, it is juſt that he ſhould not profit, at the expence of the creditors of the eſtate, by the improper acceſſion of his brother to the inheritance: there is room in this caſe to preſume a colluſion between the two brothers, and that

it was with a view to discharge himself from a part of the debts and thereby to defraud the creditors, that the solvent heir has induced his insolvent brother to accede to the succession: *Hoc est injustum*, says Dumoulin, *nec suspicione collusionis vacat. ib. n.* 93, *in fine.*

This author, *n.* 92, adduces a third exception, which is when the creditor had made a loan to the ancestor which was the cause of his fortune: in this case the solvent heir being in a manner indebted to the creditor for his part in the inheritance of a valuable estate, ought not to suffer the creditor to lose the part of this debt for which his insolvent co-heir is liable. This decision admits of much objection. Gratitude indeed requires this; but gratitude produces only imperfect obligations, which are not binding *in foro legis.*

§. III.

Of the second effect of the division of the debt which is that it may be paid in parts.

311. We have seen that one of the effects of the division of the debt, whether it be on the side of the creditor or on that of the debtor, is that the payment of the debt may be made in parts; viz. in the parts which are due to each of the heirs of the creditor, and in those due by each of the heirs of the debtor. This principle has also its exceptions and modifications, *non propter individuitatem obligationis, sed propter incongruitatem solutionis*, says Dumoulin; which is to say, not because the partial payment of a divisible obligation is not always, absolutely speaking, possible; for since the thing due has parts, it is a necessary consequence that it may be paid in parts; but if the payment of these obligations sometimes ought not to be made in parts, it it is because a partial payment is not always equitable: *Aliud quippe individuitas obligationis, aliud incongruitas solutionis.* This is a fourth key of Dumoulin, *part.* 3, *n.* 112.

312. The first case in which the partial payment of a debt, although divisible, is not valid, is the case of debts in an alternative, or of things indeterminate. For example; if he who is debtor of a certain house *or the sum of* 10,000

Heres, leaves two heirs, one of the heirs will not be admitted to pay the half of one of these two things until the other heir pays also the other half of the same thing: for if one of the heirs had paid the half, for example, of the house, and the other wished to pay the half of the money, there would result a prejudice to the creditor, who is entitled to receive one of the two things entire, and not two halves of two different things. For the same reason, although indeed the creditor had voluntarily received the half of one of the two things, *puta*, the half of the money, this payment would not receive its perfection even for this half, until the other half should be paid him; and if afterwards, the house should be given in payment, there would be room to claim back what had been paid in money. *Infra, Part. 3. n. 525.*

It is the same of debts of things indeterminate; as if the ancestor owed indeterminately an acre of land, one of his heirs is not admitted to offer to the creditor the half of a certain acre of land, until the other heir gives also in payment the other half of the same acre: otherwise there would result a prejudice to the creditor, to whom there is due an entire acre, and who has an interest in receiving an entire acre rather than the half of two different acres. This results from the law 85, §. 4, & L. 2, §. 2, ff. *de Verb. oblig. Molin. part. 2, n. 125.*

This indivision of payment must apply, not only when the debt has been divided on the side of the debtor, but also when it has been divided on that of the creditor, who has left several heirs; for it is the interest of these heirs of the creditor to receive a single thing that is their due, which would be in common only with themselves, rather than the parts of different things which they would each have in common with strangers. *Molin. ib. part. 3, n. 130.*

When one of the heirs of the debtor has been discharged for his part of the debt, whether by the release which the creditor has given him, or otherwise, nothing prevents the other heir from paying the half which he owes in either of the things he pleases; ff. *L. 2, §. 2.* The reason which

prevents the partial payment, ceases; for there is no room to apprehend that the payment would be made in parts of different things.

Observe that in the text cited, after the words, *si tamen hominem stipulatus, cum uno ex hæredibus egero*, it is necessary to add, *& victus fuero per injuriam judicis.* See *Cuj. ad. l. Molin. ib. ch. 2, n. 188.*

Observe also that the indivision of the payment of a debt in an alternative ceases to apply, when this debt, by the extinction of one of the two things, ceases to be in an alternative, and becomes determinate in the thing which remains: nothing here prevents this thing from being payable in parts, whether by the different heirs of the debtor, or to the different heirs of the creditor.

313. The second case in which the payment of an obligation, although divisible and divided among several heirs of the creditor, cannot be made in parts, is when it is so agreed in contracting the obligation, or since. It might, however, be doubted whether this agreement is valid; for the law 56, ff. 1, *de Verb. oblig.*, decides that a person cannot, in contracting, cause one of his heirs to be bound for more of his debt than in the proportion in which he shall be heir. *Te & Titium hæredem tuum decem daturum spondes: Titii persona supervacue comprehensa est; sive enim solus hæres extiterit, in solidum tenebitur; sive pro parte, eodem modo quo cæteri cohæredes ejus.* That is to say that he shall be bound notwithstanding this stipulation, for the part only for which he may be heir: and the reason is that being heir of the contracting party only for this part, and consequently a stranger in regard to the other parts, he cannot be bound for the other parts by the promise of the contracting party, according to the rule of law, *Nemo nisi de se promittere potest, non de extraneo.*

Notwithstanding this, Dumoulin properly decides that one may validly agree that a debt may be discharged in parts by the different heirs of the debtor; and he very justly remarks that this agreement differs widely from that in the

the inſtance in the law above quoted, which relates to the ſubſtance of the obligation, while this agreement relates only to the manner in which the payment is to be made: *Non concernit ſubſtantiam obligationis ſed modum; unde quemadmodum poteſt in præjudicium hæredum determinari locus & tempus ſolutionis, ita & modus; Molin. ib. part.* 2, *n.* 30 & 31. This agreement does not prevent one of the heirs of the debtor from being bound only for his part of the debt; but the effect is that he may make the payment only in the entire thing, jointly with his co-heirs; ſo that the offer which he ſhould make, to give his part, would be inſufficient to diſcharge, even for his part, the obligation for which he is liable, if his co-heirs do not equally offer their part. See *infra*, *n.* 316.

314. This agreement that the debt ſhall not be paid in parts, prevents indeed the heirs of the debtor from paying it in parts; but it does not prevent it from being payable in parts to the different heirs of the creditor.

The debtor cannot indeed validly pay to either of them but for his part; and if he ſhould pay the whole to one of them, he would not be diſcharged from the claim of the others.

Yet it may alſo be agreed that one of the heirs of the creditor ſhall have power to exact the whole, and that the payment of the whole may be made to him; in which caſe the payment made to him diſcharges the debtor towards all the heirs of the creditor, in regard to whom he who received the payment is as an agent for their parts, or as *adjectus ſolutionis gratia*; *Molin. ib. n.* 33.

315. The third caſe in which the debt, although divided between the heirs of the debtor, ought not to be diſcharged in parts, is when, without there having been any agreement, it reſults from the nature of the engagement, or from the thing which is the object of it, or from the end propoſed in the making of the contract, that the intention of the parties was really that the debt ſhould not be diſcharged in parts. This is eaſily preſumed when the thing which makes

the object of the agreement, is ſuſceptible, indeed, of ideal parts and is therefore diviſible, but cannot be divided into actual parts. *Molin. part.* 3, *n.* 223.

This is preſumed even in regard to the things which may be divided into actual parts, when they cannot be divided without a prejudice reſulting to the creditor.

For example. If I have purchaſed or leaſed a certain plantation; although this plantation be ſuſceptible of parts, yet one of the heirs of him who ſold or leaſed it to me, would not be admitted to offer me his undivided or divided part of this eſtate, in order to diſcharge himſelf from his obligation to me, unleſs his co-heirs were likewiſe, on their ſide, ready to deliver me theirs; becauſe the diviſion of this plantation would occaſion me a prejudice, I purchaſed or leaſed it only with a view to have and uſe it in the whole, and I would not have purchaſed or leaſed it in part.

The end which the contracting parties had in view may alſo prevent the payment from being made in part, even of a debt of a ſum of money. For example; if by a compoſition you have obliged yourſelf to pay me the ſum of one thouſand crowns, it being declared that it was to procure my liberation from priſon, in which I was detained for the ſaid ſum by a creditor, and afterwards you ſhould die, leaving four heirs; one of theſe heirs would not be admitted to offer me ſeparately the fourth part of this ſum, which could not procure the liberation of my perſon and which I could not ſafely keep in the priſon while waiting for the ſurplus. *Molin. part.* 2, *n.* 40.

316. In all the caſes above adduced, in which an obligation, although diviſible in itſelf, cannot however be diſcharged in parts, the creditor cannot, indeed, put the heirs of his debtor in arrear without making his demand againſt all; the demand which he might make againſt one of them to pay him the whole, would not be valid and would not put him in arrear, ſince, as the obligation is diviſible, he does not owe it in the whole; but although one of the heirs is debtor only for the part for which he is heir, and cannot be ſued for the whole, yet the indiviſion of the payment

prevents him from validly tendering the part for which he is debtor, unleſs the ſurplus is tendered at the ſame time by his co-heirs; therefore ſuch partial offers not only do not put the creditor in arrear of receiving and do not ſtop the intereſt, if the debt is of a nature to produce any, but if the heir who has made theſe offers, had been before put in arrear by a demand made on all the heirs, theſe imperfect offers would not cure his arrear, nor prevent him from being ſubject, with regard to the creditor, to all the conſequences of his arrear; ſaving his recourſe againſt his co-heirs. *Malin. p. 2, n. 243.*

Obſerve that an annuity which is not accompanied with hypothecation, divides itſelf among the heirs of the debtor as do other debts: each of the heirs is bound to continue it and pay the arrearages only in the proportion in which he is heir: but the right to redeem it under which it was contracted, is not divided. We have treated of this ſubject in our *Traite du Cont. de Conſt. de Rente. ch. 7, art. 3.* See *Dumoulin, Tract. de Div. & ind. p. 2, n. 207, 209; & p. 3, n. 23, & ſeq.*

§. IV.

Of the caſe in which the diviſion of the debt takes place, as well on the ſide of the creditor as on that of the debtor.

317. When the debt has become divided as well on the ſide of the creditor as on that of the debtor, *puta*, if the creditor has left four heirs, and the debtor has likewiſe left four; each of the heirs of the debtor, who, by the diviſion on the ſide of the debtor, is bound only for the fourth of the debt, may pay ſeparately, and for the fourth only of which he is debtor, the fourth part that is due to each of the heirs of the creditor; which is to ſay, he may pay to each of them the fourth of a fourth, or ſixteenth of the whole.

§. V.

Whether the reunion of the parts either of the heirs of the creditor, or of the heirs of the debtor, in a ſingle perſon, deſtroys the right to pay in parts.

318. The deciſion of this queſtion depends on the ſol-

lowing principle. The diviſion of the debt, which takes place by the death of the creditor or debtor who leaves ſeveral heirs, does not make ſeveral debts of one; but it only aſſigns to each of the heirs, whether of the creditor or of the debtor, parts of this debt, which before had no parts, but was only ſuſceptible of them. In this alone it is that this diviſion conſiſts: there ſtill is but a ſingle debt, *unum debitum:* the law 9, ff. *de Pact.* ſays this in formal terms. In fact, the different heirs of the creditor are creditors only of the debt which was contracted to their anceſtor; the different heirs of the debtor are debtors only of that which was contracted by their anceſtor. There is ſtill, therefore, but one debt: but this debt which was undivided and had no parts, while there was only one perſon who was debtor, and one only who was creditor, now comes to have parts and to be due in parts, whether to each of the heirs of the creditor or by each of the heirs of the debtor. It is in this that the diviſion conſiſts.

From this principle is derived the deciſion of the queſtion: the parts of the debt, in which this diviſion conſiſts, being produced by the number of perſons to whom the debt is due when the creditor has left ſeveral heirs, or by the number of perſons by whom the debt is due, when the debtor has left ſeveral, it follows that when this number of perſons ceaſes, there ceaſes to be parts in the debt; *ceſſante cauſa, ceſſat effectus;* and conſequently the diviſion of the debt ceaſes, and it can no longer be paid in parts.

If, then, a debtor or a creditor has left ſeveral heirs, and one of them has himſelf become the ſole heir of all the others, the debt will ceaſe to be payable in parts; becauſe there being now but one creditor and one debtor of the debt, there are no longer parts in the debt.

In vain is it ſaid that the debtor, having once acquired the right to pay in parts, when the creditor has left ſeveral heirs, cannot afterwards loſe it; that the obligation in which each of the heirs of the creditor was to receive his part ſeparately, muſt paſs to the ſurviving heir, who has

ſucceeded to all the obligations of the preceding heirs. This would be true, if this right to pay in parts were intrinſically inherent in the obligation, and did not on the contrary depend ſolely on the extrinſic circumſtance of the number of perſons to whom or by whom the debt is due: this circumſtance ceaſing, its effect muſt therefore ceaſe. See *Dumoulin, p.* 2, *n.* 18, *& ſeq.*

This deciſion does not apply when the ſurvivor of ſeveral heirs of a debtor has ſucceeded indeed to the inheritance of his predeceſſors, but with the benefit of inventory; for this manner of inheriting, preventing the confuſion of the beneficiary inheritance with the proper eſtate of the heir, prevents alſo a reunion of the parts of the debt. The ſurvivor owes ſeparately and in different rights the part of the debt for which he is liable on his own account, and that for which he is liable as beneficiary heir of his former co-heirs, ſince he is liable for the firſt in his proper eſtate and for the laſt only in the beneficiary eſtate of his former co-heirs. Being therefore liable for theſe different parts of the debt ſeparately and in different rights, it is a natural conſequence that he may pay them ſeparately. This is the opinion of Dumoulin, *p.* 2, *n.* 22.

319. The reunion of the parts of the heirs of the creditor in a ſingle perſon, deſtroys the right to pay in parts, in whatever manner this reunion may take place, not only when one of the heirs has become the heir of all the others, but alſo when he has acquired by ceſſion the rights of all the others.

Quid, if there was no ceſſion, could one of the heirs who had only a power of attorney from all the other co-heirs to demand the debt, or a third perſon who had this power from all, refuſe to receive the payment in parts? It ſeems he could not; for there is not in this caſe a reunion. There are in reality ſeveral perſons to each of whom the debt is due in part, and conſequently it ſeems that the debt may be paid in parts: notwithſtanding this, Dumoulin, *p.* 2, *n.* 25, decides that this attorney of all the heirs may refuſe to

receive the payment of the debt in parts. This is his reason. As, when the debt is divided between the heirs of the debtor, this division is made for the benefit of these heirs, in order that they may be liable for the debt only in the proportion in which they are heirs, and may be discharged on paying their parts; so, when the debt is divided between the heirs of the creditor, the division in this case is made only for the benefit of the heirs of the creditor, in order that each may demand and receive his part without being obliged to wait for his co-heirs to demand or receive theirs. These co-heirs of the creditor may therefore forbear to use this right that is derived from the division of the debt, which is only in their favor, according to this rule of law, *Unicuique liberum est juri in favorem suum introducto renuntiare*; and consequently he who has from all the heirs a power to receive the debt, may refuse to receive it in parts.

320. All we have hitherto said applies when the parts of several heirs of a creditor or debtor unite in the same person. It is different when a debt has been contracted at first to two creditors or by two debtors, not *in solidum*, but for their several parts. In this case there are two debts truly distinct and separate; and they do not cease to be so, although one of the two creditors or one of the two debtors may have succeeded to the others: therefore the right to pay them separately must continue. *Molin. ib. n.* 29.

§. VI.

The difference between the debt of several determinate things, and that of several indeterminate things, with regard to the manner in which they are divided.

321. When the debt of several determinate things, *puta*, of one determinate acre of land, and of another determinate acre, and the debt comes to be divided, *puta*, by the death of the creditor, who has left two heirs; the division takes place *in partes singularum rerum*. The debtor does not owe one of the two acres to one of the heirs, and the other acre to the other heir; but he owes to each of the heirs the half of each acre, saving to these heirs the division.

It is otherwise when the debt is of two indeterminate things; *puta*, if, in the instance proposed, the debtor owed, not a determinate acre, but two acres indeterminately. In this case he would owe to each of the heirs of the creditor one acre, and not the half of two. The division does not take place *in partes singularum rerum*, but numerally: *numero dividit obligatio*. This is the decision of the law 54, ff. *de Verb. oblig.*; & 39, ff. *de Solut.*

ARTICLE III.

Of the nature and effect of indivisible obligations.

§. I.

General principles respecting the nature of indivisible obligations.

322. An indivisible obligation being the obligation of a thing or act which is not susceptible of actual or of ideal parts, it is a necessary consequence that when two or more persons have contracted a debt of this kind, although they have not contracted it *in solidum & tanquam correi debendi*, yet each of them is debtor for the whole thing or act which is the object of the obligation; for he cannot be debtor of it for a part only, since it is premised that this thing or act is not susceptible of parts.

For the same reason when the person who has contracted a like debt, has left several heirs, each of the heirs is debtor for the whole of the thing, as he cannot be debtor for a part of what is not susceptible of parts. *Ea quæ in partes dividi non possunt, solida a singulis hæredibus debentur*; L. 192, ff. *de Reg. jur.*

Likewise, when the creditor of a like debt has left several heirs, the thing is due in the whole to each of the heirs; as it cannot be due in parts, since it is not susceptible of parts.

323. In this the indivisibility of obligation differs from the quality of the obligation *in solidum*: but it differs principally in this that in the indivisibility of obligation, that which makes each of the debtors debtor for the whole pro-

ceeding from the nature of the thing due, which is not susceptible of parts, this indivisibility is an actual property of the obligation, which passes with this property to the heirs and which makes each of the heirs of the debtor debtor for the whole. On the contrary, the quality of the obligation *in solidum*, proceeding from the act of the persons who have bound themselves each for the whole, is a personal quality which does not prevent this obligation *in solidum* from dividing itself between the heirs of each of the debtors *in solidum* who have contracted it, and between the heirs of the creditor to whom it has been contracted. This is perfectly explained by Dumoulin with his usual clearness: *In correis credendi vel debendi qualitas distributiva seu multiplicativa solidi, personalis est, & non transit in hæredè nec ad hæredes, inter quos active nec passive dividitur; sed qualitas solidi in individuis realis est, quia non personis, ut illa correorum; sed obligationi ipsi & rei debitæ adhæret, & tranlit ad hæredes, & in singulorum hæredum hæredes singulos in solidum, p. 2, n. 222.*

324. Hence arises another difference between the indivisibility of the obligation and its quality *in solidum*. As the latter does not proceed from the nature of the thing due, but from the personal act of the creditors who have each contracted the whole obligation, these co-debtors are not only debtors of the thing for the whole, but they are debtors of it *totaliter*. Although the primitive obligation which they have contracted *in solidum*, becomes converted, by its inexecution, into a secondary obligation, they are bound *in solidum* for this secondary obligation as they were for the primitive. For example, if two masons had obliged themselves *in solidum* to build me a house within a certain time; in case of the inexecution of this primitive obligation they will each be bound *in solidum* for the obligation of damages into which the primitive obligation is converted.

On the contrary, when the obligation is not *in solidum*, but indivisible, as when several persons have obliged themselves, not *in solidum*, for something indivisible; in this case, the indivisibility proceeding only from the nature of

the thing due, which is not ſuſceptible of parts, the debtors of ſuch an obligation are, indeed, each debtors for the whole, as they cannot be debtors of a thing in parts which is not ſuſceptible of parts; *singuli solidum debent*; but not having obliged themſelves *in solidum*, *non debent totaliter. Aliud est*, ſays Dumoulin, *p.* 8, *n.* 142, *quem teneri ad totum, aliud totaliter.* Being debtors for the whole only from the nature of the thing due, which is not ſuſceptible of parts; when the primitive obligation becomes converted into the ſecondary obligation of a thing diviſible, theſe debtors will be liable each for their part only. For example. If two maſons have bound themſelves, not *in solidum*, to build me a houſe; although they are each liable for the whole of the primitive obligation, becauſe it has for its object an act which is not ſuſceptible of parts; yet in caſe of the inexecution of this obligation, they would be liable each only for their part of the ſecondary obligation of damages into which the primitive obligation is converted; becauſe theſe damages conſiſt in a ſum of money which is diviſible. It reſults from this, *ut longe aliud est plures teneri ad idem in solidum, & aliud obligationem esse individuam.* This is another key of Dumoulin, *ibid.*

The ſame muſt be ſaid in regard to ſeveral creditors, or ſeveral heirs of a creditor of a thing indiviſible. They are creditors of the whole, *singulis solidum debetur*; but they are not ſo *totaliter*, as are creditors *in solidum*, who are called *correi debendi*; *& aliud est pluribus deberi idem in solidum, aliud obligationem esse individuam.* This will be explained *in decursu* in the following paragraphs.

325. From this principle, *aliud est debere totum, aliud est debere totaliter*, it follows that an indiviſible obligation is, not the leſs, ſuſceptible of deduction. For example, if my relation to whom I have ſucceeded, has charged me with a right of way to Peter over my land, and there remains of the eſtate, after the debts are paid, only the ſum of 200 livres, and this right of way is worth 300 livres; although this charge and the obligation reſulting therefrom are indiviſible, and the right of way which is the object thereof are

alſo indiviſible, yet, as I am not bound by this obligation *totaliter*, but only to the amount of the 200 livres which remain of the eſtate, this charge and this obligation, although indiviſible, are ſuſceptible of deduction, not indeed with regard to the thing itſelf which is not ſuſceptible of parts, but with regard to its value; therefore I would owe to Peter a right of way entire, but with this modification that he could not require it without allowing me the ſum which it is worth beyond the 200 livres, to which amount alone I am liable for the diſpoſition of the teſtator; *Arg. l.* 76, ff. *de Leg.* 2.

§. II.

Of the effect of the indivisibility of the obligation in dando aut in faciendo, *with regard to the heirs of the creditor.*

326. When the obligation is indiviſible, each heir of the creditor being creditor of the whole thing, it reſults that each of the heirs may demand the whole thing from the debtor.

For example; if one has bound himſelf to give me, for the benefit of my land, a right of way over his, or procure it through ſome other adjoining; this right being indiviſible, each of my heirs may demand from the debtor the whole; L. 2, §. 2, ff. *de Verb. oblig.*

Likewiſe, if one has obliged himſelf to me to make a picture, or build a houſe, each of my heirs may demand from him that he make the picture or build the houſe entire.

But as each of my heirs, although creditor of the whole thing, is not however creditor *totaliter*; if, on the demand of the whole thing, by one of my heirs, the debtor, failing to perform his obligation, be condemned to the damages, he will not be liable to this heir for more than the part for which he is heir; for, although creditor of the whole thing, he is nevertheleſs creditor as my heir only for part. If he has a right to demand the whole thing, it is becauſe the thing cannot be demanded in part, not being ſuſceptible of parts: but the obligation of this indiviſible thing converting itſelf, by the failure of the debtor, into an obligation of dam-

ages, which is divisible, my heir for part cannot claim, of these damages, more than for his part; L. 25, §. 9, ff. *Fam. ercisc.*

In this the heirs of the creditor of an indivisible debt are different from creditors *in solidum* who are called *correi credendi*. Each of these being creditor not only of the whole thing due, but being so *totaliter*; if, on the demand of the creditor, the debtor does not perform his obligation, he may be condemned towards him for the damages in the whole.

327. From this, that the heir for part of an indivisible debt, although creditor of the whole thing, is not so however *totaliter*, it follows also that he cannot release the debt for the whole as a creditor *in solidum* could. L. 10, §. 12, ff. *de Accept.*

Therefore if the creditor of an indivisible debt left two heirs, and one of them has released to the debtor his interest in the debt, the debtor will not be discharged from the other. Yet the release will have its effect. The other heir may, indeed, demand from the debtor the thing entire; but he can only demand it on offering to allow one half of the value of this thing; for the thing due, although indivisible in itself, has however a value, which is divisible, and which may, in this case, be resorted to: this is a modification which the indivisibility of the debt in this case admits of.

It would not be sufficient for the debtor to offer to him who has not released his right, the half of the price of the thing due: for this heir is creditor of the thing itself, and his co-heir, in releasing his own right, could not prejudice that of this heir. This is taught by Dumoulin, *Tract. de Div. & ind. p.* 3, *n.* 189. *Stipulator servitutis reliquit duos hæredes, quorum unus accepto fecit promissori ..... debet alteri hæredum totam servitutem, sed non totaliter, utpote deducendæ æstimatione dimidiæ partis ..... sed cujus est electio? Breviter dico creditoris, videlicet alterius hæredis, quia cohæres etiam vendendo & pretium recipiendo, nocere non potuit, nisi in refusio-*

ne pretii, si hic hæres noluit jus suum vendere; igitur gratis remittendo non potest in plus nocere.

328. The ſame principle muſt apply when the debtor has become the heir of the creditor for half; the other may demand from him the thing entire, on offering to allow him the half of the value.

329. All that we have ſaid of the ſeveral heirs of the creditor of an indiviſible debt, applies in regard to the ſeveral creditors not *in solidum*, to whom a like debt may have been contracted.

§. III.

Of the effect of indivisible obligations in dando aut faciendo, *with regard to the heirs of the debtor.*

330. When the debt is indiviſible, each of the heirs of the debtor being debtor for the whole thing, it reſults that a demand may be made on each of the heirs for the whole thing: but as he is not debtor of it *totaliter*, but only as heir in part of the debtor and conjointly with his co-heirs, it follows that, on being ſued, he may demand a time to call in his co-heirs, and that he cannot be condemned alone except on his failing to call them in to be made parties with him. Dumoulin grounds this deciſion upon the law 11, §. 23, ff. *de Leg.* 3, *Si in opere civitatis faciendo relictum sit, unumquemque hæredem in solidum teneri D. Marcus & Verus Proculæ rescripserunt: tempus tamen cohæredi Proculæ, quem Procula vocari desideravit, ut secum curaret opus fieri, præstiterunt, intra quod mittat ad opus faciendum, postquam solam Proculam voluerunt facere, imputaturam sumptum cohæredi.* Dumoulin, *p.* 3, *n.* 90 & 104; & *p.* 2, *n.* 469, & *seq.*

331. Further, when the heir who is ſued by the creditor of an indiviſible debt, is heir only for a ſmall part, and there is another heir for a much greater part; *puta*, if, in ſome cuſtomary provinces, a creditor has ſued a younger brother who is heir only for a ſmall part, the eldeſt being principal heir; in this caſe the heir who is ſued may not only aſk a time to bring in his co-heir, but may require that the creditor ſhall proceed againſt the principal heir,

the younger brother offering to pay his part. *Molin. ib. n.* 105.

332. Further, as to the effect of the indiviſible obligation *in dando vel in faciendo*, with regard to the heirs of the debtor, three caſes are to be diſtinguiſhed, according to Dumoulin. This debt is either of a nature that it may be diſcharged only by the heir of the debtor who is ſued; or it is of a nature that it may be diſcharged ſeparately, either by him who is ſued or by each of his co-heirs; or it is of a nature that it may be diſcharged only by them all jointly.

We may adduce, as an example of the firſt caſe, the debt of a right of way, which the anceſtor promiſed to grant over a piece of land, that has fallen by the diviſion to one of his heirs. It is this heir alone, to whom the land has fallen in the diviſion, who can diſcharge this debt; becauſe ſuch a right can be granted only by the owner of the land. In this caſe he will alone be condemned to grant it, by a judgment, which, on his failure to do ſo, will be equivalent to the deed by which he ought to grant it: *Molin. p.* 3, *n.* 100. ſaving to him his recourſe or indemnity againſt his co-heirs if he was not charged, by the diviſion, with the grant of this right.

333. We may adduce, as a firſt example of the ſecond caſe, the debt of a ſimilar right, which the anceſtor bound himſelf to procure to another over the land of a third perſon. The thing, which is the object of this obligation, is an indiviſible thing, and which in its nature may be diſcharged ſeparately by each of the heirs of the debtor. For it is in the power of each of them, at leaſt *natura*, to treat with the owner of the land over which this anceſtor engaged to procure this right. The creditor will then be entitled to demand this right of way for the whole from each of the heirs of the debtor. For this right, being indiviſible, each is liable for the whole debt. But as this heir, though debtor of this right for the whole, is not however bound for it *totaliter*, and as he is bound jointly with his co-heirs,

he may ask a delay to bring them into court, that they may jointly with him procure to the creditor the right which is due him; otherwise, that they be all condemned to the damages of the creditor, and being all condemned thereto, they will be liable, each for his part only; because this obligation of damages is divisible.

If he neglects to call in his co-heirs and have them made parties, he will be condemned alone to procure to the plaintiff the right which was promised him by the ancestor; and on failure will alone be condemned to the damages: saving his recourse against his co-heirs. *Molin. p.* 2, *n.* 175. For having neglected to bring them in, he ought alone to suffer the condemnation. He is bound in this case, *quasi ex facto proprio*; having alone submitted to the suit, *non tantum quasi hæres.*

Observe that this judgment for damages ought to be given, although the heirs of him who promised this right, should be ready to purchase it from the owner of the land on which it was to be given, and this owner would not grant it on any terms. For as we have seen before, it suffices that what was promised be possible in itself, although it was not in the power of the ancestor who promised it or of his heirs, for the obligation to be valid, and to give a claim, in case of its inexecution, for damages. He who contracted the obligation ought to impute it to his own folly that he unadvisedly promised to procure it to be done by this third person.

A second example is the obligation I have contracted to another to build him a house on his land. This obligation is indivisible: the creditor may sue each of my heirs and demand that they be condemned to build the house entire. But as each heir, although bound for the building of the whole house, is not however debtor *in solidum*, he may require that his co-heirs be brought in, and this being done, on their failure to perform the obligation, they will be condemned to damages, each in the proportion of his part in the inheritance.

Thoſe who were ready to concur will be condemned as well as thoſe who refuſed; ſaving their recourſe againſt the latter: becauſe each is bound to build the whole houſe, and it is ſomething which each may do ſeparately.

If one of the heirs, who was ſued for the building of the whole houſe, did not cauſe his co-heirs to be brought in, he would alone be condemned to damages for the whole, in caſe of the inexecution of the obligation. It is his own fault that he did not bring in the other heirs.

334. It remains for us to ſpeak of the third caſe, in which the indiviſible debt cannot be diſcharged but by all the debtors jointly. We may adduce, as an example, the caſe of one who, by a compoſition, had bound himſelf to grant you a right of way over his land, in ſuch part of it as he ſhould indicate. If he died without performing this obligation, leaving ſeveral heirs, who ſucceed in common to his eſtate, the obligation to grant the right of way, to which they ſucceed, is an indiviſible obligation, which cannot be diſcharged but by all the heirs jointly, as a right of way, and the like, can only be granted by thoſe who are owners of the land. L. 2, ff. *de Serv.* L. 18, ff. *Comm. Præd.*

In the caſe of this kind of obligation, if one of the heirs declares that he is ready, as far as it in him lies, to perform the obligation, and it depends on the other heirs alone to complete the performance of it, it is only he who refuſes who muſt be condemned to the damages: for he who tenders is not in arrear. *Molin. ib. p.* 3, *n.* 95.

If a penalty had been ſtipulated in caſe of the inexecution of the obligation, the co-debtor or co-heir who had not been in arrear, would, not the leſs, be liable for his part of the penalty incurred by the delay of the other, *non immediate, ſed ejus occaſione, & tanquam ex conditionis eventu*; as in diviſible obligations.

335. Obſerve that the law 25, §. 10, ff. *Fam. ercisc.* contains nothing contrary to the diſtinctions we have hitherto made: for, as Dumoulin remarks, *p.* 8, *n.* 99, this text does not ſuppoſe that the heir, for part, of the debtor of an

indivisible thing, would always and without distinction be liable to pay the value of the whole in case of the inexecution of the obligation; but it decides only that in the case in which he should be liable, *puta*, when he has suffered himself to be condemned without bringing in his co-heirs, who were bound as well as he, he would have against them the action *familiæ erciscundæ*, to obtain an allowance for it in the division.

§. IV.

Of the effect of indivisible obligations in non faciendo.

336. When one has bound himself to another not to do a certain thing; if what he bound himself not to do is something indivisible, *puta*, if he bound himself to his neighbour not to prevent him from passing over his land, the contravention by one of his heirs will give room to the action of the creditor against all the heirs, that they may be prohibited from contravening the obligation, and condemned to damages; with this difference, that he who has contravened it, ought to be condemned for the whole, *quia non tenetur tantum tanquam hæres, sed tanquam ipse & ex facto proprio*; and the other heirs ought to be condemned only in the part for which they are heirs and saving their recourse against him who contravened the obligation, that he be holden to pay in their discharge, or indemnify them if they have been compelled to pay. They are not bound, *in solidum*, as is he who contravened the obligation, but only for their part in the inheritance, *quia tenentur tantum ut hæredes*. It is in this sense that Dumoulin says we ought to understand the law 2, §. 5, ff. *de verb, oblig. Si stipulatus fuero per te non fieri, neque per hæredem tuum quominus mihi ire, agere liceat, & unus ex pluribus hæredibus prohibuerit, tenentur & cohæredes ejus; sed familiæ erciscundæ repetent ab eo quod præstiterint. Dumoulin, part, 3, n. 168, & seq.*

With regard to the creditor, those who have not contravened are bound for the contravention of this co-heir; and in this the obligations *in non faciendo* differ from obligations *in faciendo*. For when the obligation consists in do-

ing something indivisible, which can only be done by both jointly and one of them offers to do it, while the other refuses to concur. We have seen *supra, n.* 334, that, according to the opinion of Dumoulin, the creditor has no action against him who was not in arrear, but only against him who refused.

The reason of this distinction is, that it is the arrear of the debtor that gives room for the action, in obligations *in faciendo*. Hence it follows that it cannot arise, against him who is ready and willing *quantum in se est* to perform the obligation, and who consequently is not in arrear. On the contrary in obligations *in non faciendo* it is the act itself, from which the debtor promised that he and his heirs would abstain, which gives room to the action of the creditor. Therefore it suffices that one of the heirs do it, to give room to the action against all. It must be supposed that such was the intention of the contracting parties. For otherwise he, to whom another has bound himself not to do a thing, would not be safe, and it would often happen that when what was stipulated not to be done should be done, he could not sue any one, for want of knowing who did it: it not often being easy, when a thing has been done, to know who it was done by. Whereas in obligations that consist in doing a thing, it cannot be difficult to know who is in arrear or refuses, by making a demand.

Dumoulin, *part.* 1, *n.* 27, gives to the heirs who have not contravened, the plea of discussion by which they may compel the creditor previously to ascertain, at their costs, the insolvency of the one who has contravened.

CHAPTER V.

Of penal obligations.

337. A PENAL obligation is, as we have already seen, that which results from the clause of an agreement, by which a person, in order to assure the execution of a pre-

vious engagement, binds himself, in the form of a penalty, to something, in case of the inexecution of this engagement. For example. If you lent me a horse to perform a journey, which I bound myself to return to you sound and in good order, and to pay you fifty pistoles, if I did not return him so; this obligation which I contracted to pay fifty pistoles, if I did not return him sound and in good order, is a penal obligation.

To treat this subject in order, after having shewn in the first article the general principles respecting the nature of penal obligations, we shall see in the second, when the penalty is incurred; we shall examine in the third, whether the debtor may, in discharging his obligation in part, avoid a part of the penalty: we shall discuss in the fourth, whether the penalty is incurred for the whole and by all the heirs of the debtor, on the contravention by one of them; and in the fifth, whether the contravention made towards one of the heirs of the creditor, causes the penalty to be incurred for the whole and towards all the heirs of the creditor.

Article the First.

Of the nature of penal obligations.

First Principle.

338. A penal obligation being from its nature accessory to the principal and primitive obligation, the nullity of this carries with it the nullity of the penal obligation. The reason of this is that it is of the nature of accessory things, that they cannot exist without the principal thing. *Quum causa principalis non consistit, ne ea quidem quæ sequuntur locum obtinent.* L. 129, §. 1, ff. *de Reg. Jur.* Besides the penal obligation, being the obligation of a penalty stipulated in case of the inexecution of the primitive obligation, if the primitive obligation is not valid, the penal obligation cannot take place; for there cannot be a penalty for the inexecution of an obligation, which, not being valid, could not and ought not to be performed.

The law 69, ff. *de Verb. oblig.*, contains an example of

this diviſion. You had promiſed to me to give me a certain ſlave, of the death of whom you were ignorant, and to pay me a ſum of money, as a penalty, if you failed to give him to me. Ulpian decides that the penal obligation is no more valid than the principal one, which, being that of an impoſſibility, cannot be valid. *Si homo mortuus sisti non potest, nec pœna rei impossibilis committetur, quemadmodum si quis Stichum mortuum dare stipulatus, si datus non esset, pœnam stipuletur.*

339. This principle that the nullity of the primitive obligation carries with it that of the penal obligation, admits of an expreſſion, in the caſe of an obligation, in the performance of which, he, to whom it has been contracted, had no appreciable intereſt; *puta, cum quis alteri stipulatus est.* We have ſeen *supra, n.* 54, that ſuch an obligation is not valid. Yet, the penal obligation that is annexed to it is valid. *Alteri stipulari nemo potest . . . . Plane si quis velit hoc facere, pœnam stipulari conveniet, ut nisi ita factum sicut est comprehensum, committatur pœnæ stipulatio etiam ei cujus nihil interest, &c. Instit. tit. de inut. Stip.* §. 18. The reaſon is that the principal obligation is void in this caſe, only becauſe the debtor may contravene it with impunity; he to whom it has been contracted having in ſuch caſe, no damage to claim on account of its inexecution; the penal obligation that is added cures this defect, in preventing the debtor from contravening the obligation with impunity.

Likewiſe, although one could not validly promiſe the act of another, the penal obligation added to an agreement, by which one has promiſed the act of another, is valid. For the penal clauſe ſhews that he who promiſed had not ſimply an intention to promiſe the act of another, but that he had authority from this perſon, and conſequently he has promiſed *non de alio, sed de se.* Supra, *n.* 56.

Frain, in his reports of caſes, determined in the Parliament of Brittany, relates one, of the 12th of January 1624, which was decided on this principle. The relation of a canon, who had offended the biſhop of St. Malo, had pro-

mised to the biſhop that the canon ſhould not appear in the city during four months, and bound himſelf to pay the ſum of three hundred livres in caſe of a contravention. The canon coming into the city within that time, the agreement was holden to be valid, and the penalty incurred.

Second Principle.

340. The nullity of the penal obligation does not carry with it the nullity of the principal obligation. The reaſon is that the acceſſory cannot indeed exiſt without the principal; but the principal does not depend on the acceſſory and may exiſt without it. This is the deciſion of the law 27, ff. *de Verb. oblig. Si ſtipulatus ſum te ſisti, niſi ſtiteris, hippocentaurum dari, perinde erit atque ſi te ſisti ſolummodo ſtipulatus eſſem:* and as Paul ſays in L. 126, §. 3, *d. tit. Detracta prima ſtipulatione, prior manet utilis.*

Third Principle.

341. The penal obligation has for its object to aſſure the performance of the principal obligation.

Hence it muſt be concluded that the intention of the contracting parties was not, by the penal obligation, to extinguiſh or diſſolve the principal obligation, nor to merge the latter in the former. L. 21, §. 2, ff. *de Verb. oblig.*

Therefore, although the penal obligation be incurred by the arrear of the debtor to perform the principal obligation, the creditor may, inſtead of demanding the penalty, ſue for the performance of the principal obligation. L. 28, ff. *de Act. empt.* L. 122, §. 2, ff. *de Verb. oblig. & paſſim.*

Therefore, when ſtipulating a penalty in caſe of the inexecution of a principal obligation, the intention of the parties was that in ſuch caſe, as ſoon as the debtor ſhould have been put in arrear to perform the principal obligation, nothing more ſhould remain due than the ſum ſtipulated. Such ſtipulation is not a penal ſtipulation; the obligation which reſults from it is not a penal obligation, but as much a principal obligation as the firſt, of which the party in-

penalty, which ought not to be. Such is the inſtance in the law 10, §. 1, ff. *de Pact.* which we have juſt quoted. That in the law 122, which is oppoſed to us, is very different. After a diviſion which is in itſelf valid and not ſubject to any reſciſſory action, we had, in order to avoid a ſuit, however groundleſs, agreed under a certain penalty not to litigate it. The object of this agreement was not, as in the preceding caſe, to procure to me the releaſe of an action which you might have againſt me to ſet aſide the diviſion, becauſe you could have none; the only object of this agreement was to avoid a ſuit; therefore if you have brought one, although it has been diſmiſſed by a judgment in my favor, the penalty will be incurred: for the only thing which was the object of the agreement being to avoid a ſuit, however groundleſs, as you have obliged me to defend a ſuit, it is true to ſay that you have contravened the agreement in regard to that which was the object of it; whence it follows that the penalty is incurred.

344. Our rule that the creditor cannot have both the principal and the penalty, admits of an exception, not only when it is ſaid expreſsly in the penal clauſe that on failure of the debtor to perform his obligation within a certain time, the penalty ſhall then be incurred and ſhall become due, without prejudice to the principal obligation, which would be expreſſed by theſe words *rato manente pacto*; L. 16, ff. *de trans.*; but alſo whenever it appears that the penalty was ſtipulated as an indemnification of what the creditor may ſuffer, not from the abſolute inexecution of the obligation, but from the mere delay in the performance of it: for in this caſe the creditor who has ſuffered from the delay, may receive the principal and the penalty.

Fifth Principle.

345. The penalty ſtipulated in caſe the obligation be not performed, may, when it is exceſſive, be reduced and moderated by the judge.

This principle is derived from a deciſion of Dumoulin, in his treatiſe *de eo quod interest*, *n.* 156, *& ſeq.* He grounds

it on this, that it is of the nature of the penalty that it be in lieu of the damages which might be claimed by the creditor in caſe the obligation be not performed. Therefore, ſays he, as, when the creditor claims an exceſſive ſum for the damages which he pretends to have ſuſtained from the inexecution of the obligation, the judge ought to reduce it, and as the law, *Cod. de sent. quæ pro eo quod interest prof.*, does not allow that the damages ſhould exceed double the value of the thing which made the object of the primitive obligation; ſo, when the penalty ſtipulated in lieu of damages is exceſſive, it ought to be reduced: for this penalty may well, indeed, exceed the amount of the damages, and even be due when the creditor might not have ſuſtained any, becauſe it has been ſtipulated to avoid the diſcuſſion of the queſtion whether the creditor has actually ſuſtained any damages and to what amount; but being in lieu of the damages of the creditor, it is contrary to its nature that it ſhould be carried beyond the limits which the law preſcribes to damages. If the law above cited reſtrains them, and does not permit that they ſhould be claimed *ultra duplum*, even when the inexecution of the contract may have really occaſioned a greater loſs to the creditor, who finds himſelf, on this account, *versari in damno; a fortiori* the exceſſive penalty, to which the debtor unadviſedly ſubmitted, ought to be moderated and reduced when the creditor has not ſuffered any loſs, or has ſuffered one much below the amount of the penalty ſtipulated, and conſequently in the caſe in which *certat de lucro captando*. In fine, Dumoulin grounds his opinion on the text of the law before cited, *Cod. de sent. pro eo quod interest*, &c. which from its general terms ſeems to include *interesse conventionale*, as well as other kinds of damages.

Azon is of an opinion contrary to that of Dumoulin. He decides that a penalty ſtipulated in the form of damages, is not ſubject to be moderated. It may be ſaid in favor of his opinion, that there is a difference between the damages ſtipulated, and thoſe which are regulated by the contract. With regard to the latter, it is true, indeed, that the

debtor, in contracting the primitive obligation, is presumed to have contracted the secondary obligation of damages which might result from the inexecution of the primitive obligation; but there is room to presume that he did not intend to bind himself *in immensum* for the damages, but only *intra justum modum*, and to the extent of the sum to which it was probable they could amount. But the same cannot be said of the damages which are stipulated; for *ubi est evidens voluntas, non relinquitur præsumptioni locus.* However excessive the sum may be which is stipulated in the form of damages in case of the inexecution of the agreement, the debtor cannot deny that he intended to bind himself for it, when the clause of the contract has so expressed it. Notwithstanding these reasons, the decision of Dumoulin appears more equitable. When a debtor binds himself for an excessive penalty in case of the inexecution of a primitive obligation which he contracts, there is cause to presume that it was the confidence of the debtor that he should not fail in the performance of the primitive obligation which induced him to subject himself to so excessive a sum; that he did not think to engage any thing in subjecting himself to it, and that he would not have bound himself in such penalty if he had thought the case would happen in which the penalty was to be incurred: thus the consent which he gave to the obligation of a penalty so excessive, being a consent founded on error, is not a valid consent: therefore these excessive penalties ought to be reduced to the sum to which the damages of the creditor, resulting from the inexecution of the primitive obligation, may amount at the highest. This decision ought to apply in commutative contracts, because as equity, which ought to reign in these contracts, does not permit that one of the parties should profit and enrich himself at the expence of another, it would be contrary to this equity that the creditor should enrich himself at the expence of the debtor in exacting from him a penalty too excessive and manifestly too much above what he has suffered from the inexecution of the primitive obligation. The decision ought likewise to apply in donations, *cum nemini sua liberalitas debeat esse captiosa.*

The text of the Inſtitutes, *tit. de inut. Stip.* §. 20, does not more than the law 38, §. 17, ff. *de Verb. oblig.*, decide any thing againſt the deciſion of Dumoulin: for from what is there ſaid, *Pœnam cum quis stipulatur, non inspicitur quod interest ejus, sed quæ sit quantitas in conditione stipulationis*, it follows that the penalty may be due, although he in whoſe favor it has been ſtipulated has not ſuffered any thing from the inexecution of the primitive obligation or has ſuffered leſs than the penalty; but it does not in any manner follow that this penalty may be immenſe and in no proportion to the object of the primitive obligation.

With regard to the law 56, *de Evict.*, which ſuppoſes that one may ſtipulate in a contract of ſale, the reſtitution of the triple or quadruple of the price in caſe of eviction, it is anſwered in different ways. Noodt pretends that the words *triplum aut quadruplum* are a bad gloſs, which is not in the text, and ought to be retrenched. Dumoulin, *ibid. n.* 167, *& seq.* anſwers better in ſaying that the queſtion in this law is not what may be validly ſtipulated in caſe of eviction, and therefore that it is not to be concluded that one may always and without diſtinction, in all contracts of ſale, ſtipulate validly the reſtitution of the triple or quadruple, in caſe of eviction; that it is only to be concluded that ſuch a ſtipulation may be ſometimes inſerted in contracts of ſale, and theſe caſes are when a thing has been ſold not ſimply, but in circumſtances in which the purchaſer might ſuffer a great loſs in the reſt of his property, in caſe of eviction from the thing ſold, which riſk was known and foreſeen by the contracting parties, as in the following caſe. I ſell to a merchant, a little before the fair, a booth, and it is expreſsly mentioned in the contract, that it is for the purpoſe of putting his goods in. The riſk which the purchaſer runs in caſe of eviction, during the time of the fair, not to find a booth to be hired or ſold, and conſequently to loſe the ſale of his goods, is the riſk of a damage foreſeen by the contracting parties at the time of the contract, which damage may conſiderably exceed the price of the booth, and to which the ſeller ſubjects himſelf. Therefore, in this caſe,

the damages which were not fixed by the contract would be valued above the double, triple or quadruple of the price of the thing sold. Likewise one may, in the same case, stipulate a penalty above the double of the price of this thing; and the penalty is not in this case judged excessive, for not being in any proportion to the price of the thing sold; provided it be in some proportion to the damage, which the purchaser has sustained by the loss of the sale of the goods. Since it was in lieu of this damage that it was stipulated.

346. It remains to be observed that if the penalty which is in lieu of the ordinary damages, is subject to be reduced when it is excessive, *a fortiori*, the penalty stipulated in case of the failure to pay a sum of money or other thing which is consumed in the use, ought to be reduced to the lawful rate of interest of which it is in lieu, or even entirely rejected, when interest may not lawfully be stipulated.

Article II.

When the penalty of the obligation is incurred.

§. II.

Of the case in which a penal clause has been added to an obligation to do something.

347. It is evident in this case that the penalty is incurred, as soon as he who bound himself under the penalty not to do a thing, has done the thing which he bound himself not to do.

348. Is it necessary that the act on which the penalty is to be incurred, should have its effect? This depends on what was the intention of the parties. Suppose that in making a division or a composition we have reciprocally promised not to litigate the same, under the penalty of a certain sum, payable by the party contravening his promise to the other. Afterwards you have brought suit against me to procure this division or composition to be annulled. This suit, although it has had no effect and has been dismissed by a judgment in my favor, causes the penalty to be incurred; *Arg.* L. 1, 122, §. 6, ff. *de Verb. obl.* The

reaſon is, that in ſtipulating with you, under a certain penalty that you ſhould not litigate what we had done, I did not preciſely underſtand that you ſhould not ſet aſide the diviſion or compoſition, which being valid of themſelves, would have remained ſo notwithſtanding the ſtipulation. What I intended to ſtipulate with you was, that you ſhould not oblige me to conteſt a ſuit. It ſuffices then that you have brought ſuit, though you have failed in it, for the penalty to be incurred. It cannot be ſaid, in this caſe, that I am paid for both the principal obligation and the penalty, which is contrary to the fourth principle we have eſtabliſhed in the preceding article: for the principal obligation which you contracted to me, not to litigate the diviſion or compoſition, and to which the penal obligation was attached, had for its object that you ſhould not bring a ſuit againſt me: and you failed to perform this principal obligation, becauſe you have made me ſuſtain one; I may therefore exact the penalty.

On the contrary, if I have ſtipulated with you, under a certain penalty that you ſhould not let your houſe, adjoining the one I occupy, to a blackſmith, or other perſon of the like trade; the leaſe you made of it to ſuch a perſon, if he did not come into the houſe, will not cauſe the penalty to be incurred. For what I had in view in ſtipulating this with you, was only to avoid the inconvenience of the noiſe which ſuch workmen make. As the houſe was not uſed for a purpoſe creating this inconvenience, the penalty ought not to be incurred.

For the ſame reaſon Papinian decides in the law 6. ff. *de Serv. export.* that when a ſlave has been ſold under a condition that the purchaſer ſhould not emancipate him, and under a certain penalty, if he did, a void deed of emancipation does not cauſe the penalty to be incurred.

§. II.

Of the caſe in which a penal clauſe has been added to the obligation to give or do ſome thing.

849. In this caſe the penalty is incurred when the

debtor has been put in arrear to give or do what he has promiſed. The civil law makes a diſtinction, when the agreement contains a fixed time in which the debtor is to give or do what has been agreed, and when it does not contain ſuch a time. In the firſt caſe, they decide that the penalty is due, *de pleno jure*, as ſoon as the time is expired, without there being any neceſſity for an interpellation on the debtor, and that he could not be diſcharged from it, by offering, after the expiration of the time, to perform the principal obligation: L. 23, ff. *de obl. & act.*

The expiration of the time appeared to the Roman juriſts ſo fully ſufficient to operate a forfeiture of the penalty, without the neceſſity of otherwiſe putting the debtor in arrear, that they held the penalty to be forfeited, even when the debtor had died before, without leaving any heirs, and there was conſequently no one who could be put in arrear. This is the deciſion of the law 77, ff. *de Verb. oblig.*

Further, the law 112, ff. *de Verb. oblig.* decides that when the obligation to which a penal clauſe has been added, is to do within a certain time a certain piece of work, the execution of which requires a particular time, the penalty is due, even before the expiration of the time ſtipulated, as ſoon as it becomes certain that the work cannot be done in this time; ſo that the enlargement of the time which might afterwards be granted to the debtor, would not diſcharge him from the penalty incurred before this enlargement.

In the ſecond caſe, when the obligation to give or to do a thing includes no fixed time, the law 122, §. 2, decides that the penalty is incurred only on the demand of the creditor *litis contestatione*.

With us, whether the primitive obligation includes a time within which it is to be performed, or not, it is commonly neceſſary that there be a judicial demand in order to put the debtor in arrear, and thereby cauſe the penalty to be incurred. I have ſaid *commonly*; for there are caſes in which the penalty as well as damages may be incurred, without any demand, *ſupra*, n. 147.

It is to be obſerved that the penalty cannot be incurred, when it is by the act of the creditor that the debtor is prevented from performing his obligation. L. 122, §. 3, *de Verb. oblig.*

ARTICLE III.

Whether the debtor may, in performing his obligation, in part, avoid part of the penalty.

350. A debtor cannot pay to the creditor, againſt his conſent, part of what he owes, as long as his obligation, although diviſible, is ſtill undivided, as we ſhall ſee *infra*, *part* 3, *chap.* 1, *art.* 3, §. 2. Therefore the tender he ſhould make to the creditor of part of what is due, would not diſcharge him from the penalty ſtipulated in caſe of the inexecution of the obligation, if the creditor refuſed the partial payment.

But if the creditor has willingly received part of the payment of his debt, is the penalty incurred for the whole, in caſe of failure to pay the part that remains due? Ulpian, in the law 9, §. 1, ff. *Si quis caution. in jud.*, decides that although, *subtilitate juris*, it may appear that in this caſe the penalty ought to be incurred for the whole, yet it is equitable it ſhould be ſo only in proportion to the part of the principal obligation that remains to be performed. The true reaſon of this deciſion is that given by Dumoulin, and which we have mentioned above: namely, that the penalty being preſumed to be promiſed as an indemnification for the inexecution of the obligation, the creditor cannot receive both. When therefore he has been paid for part of the principal obligation, he cannot receive the penalty for that part, otherwiſe he would receive both, which ought not to be. This is the tenth key of Dumoulin, in his treatiſe *de div. & ind. p.* 3, *n.* 112. *In omnibus sive individuis, sive dividuis, pœna non committitur, nisi pro parte contraventionis efficacis, nec potest exigi cum principali; sed creditor non tenetur partem principalis & partem pœnæ accipere.*

This will be illuſtrated by an example. In ſelling me a farm not ſtocked with cattle for its neceſſary uſe, you have

bound yourself to supply me with two yoke of oxen, under the penalty of five hundred livres, for the damages, in case you failed to deliver them. You will not be allowed in this case to compel me to receive one yoke of oxen, as I am not compellable to receive a part of what is due me; and consequently the tender you should make of one yoke, if I do not chuse to receive it, would not prevent your being liable to me for the whole penalty of five hundred livres. But if I willingly received the yoke of oxen which you tendered me, on your failing to deliver me the other yoke, I shall be entitled only to one half of the penalty. For having received a part of what was the object of the agreement, I cannot have the entire penalty, as I cannot have both.

351. Our principle that the penalty is due only in the proportion, and as to the parts in which the principal obligation is not performed, applies equally, whether you bound yourself, under a penalty, in case you did a certain thing, or in case a third person did it. If you bound yourself under a penalty of three hundred livres, that Peter should not claim a piece of land in my possession, the penalty will be incurred only for one half, if Peter claims only one half of it, unless the contrary appeared to have been the intention of the parties. *Molin. ibid. p.* 3, *n.* 531.

352. These decisions apply especially in regard to obligations of things divisible. It would seem that they could not apply to obligations of indivisible things, yet they do sometimes apply to such.

I. Although the use of a right of way, or the like, is something indivisible, and consequently the obligation which the owner of the land over which it is granted contracts to allow it, is an indivisible obligation; yet, when the right of way is limited to a particular purpose for which it was instituted, which purpose terminates in something divisible, if this purpose has been accomplished in part, the penalty will be divided and will be due only for the part for which it has not been accomplished. This will be illustrated by an example.

I own a piece of land to which is attached a right of way over yours, by which the poſſeſſors of yours are bound, during the time of vintage, to ſuffer me to convey my wine over your land, under a penalty of three hundred livres in caſe I be diſturbed in this right. In this caſe, if, after ſuffering one half of my wine to be carried over your land, you have prevented the reſt from being carried, you will only incur one half of the penalty of three hundred livres. For although the right of way is indiviſible and the obligation to allow the exerciſe of the right is the obligation of ſomething indiviſible, yet as the right is limited to a purpoſe which is the tranſporting of my wine, and my wine is ſomething diviſible, it cannot be denied that I have partially obtained the purpoſe for which the right of way was eſtabliſhed, and that you have permitted me partially to exerciſe it, by ſuffering me to tranſport one half of my wine over your land. I can demand, therefore, only one half of the penalty; for I cannot receive the penalty for the whole, and enjoy a part of the benefit of the right of way. I cannot have both. This Dumoulin teaches in the caſe which we have quoted. *Quia*, ſays he, *hæc ſervitus de ſe individua, dividuatur ex accidenti, & ex fine dividuo .... & debet judicari ſecundum regulam dividuarum; p.* 3, *n.* 363.

353. II. Theſe principles alſo apply even in the caſe of indiviſible obligations, in the following inſtances and others ſimilar to it. You have bound yourſelf by a contract under a certain penalty to procure me a right of way over a piece of land of which you are tenant for life, imagining you could cauſe the grant of this right to be confirmed by the reverſioners. Three of theſe confirm it, but the fourth refuſes. The penalty, it is true, is due me for the whole; for the refuſal of one of the reverſioners to confirm it, prevents the validity of the grants, notwithſtanding its confirmation by the three others; as a right of way cannot be granted for part, but muſt be granted by all the owners of the land. But as the confirmation of three of the reverſioners, though it is of no uſe in paſſing the right, has nevertheleſs ſome effect, which is to bind perſonally thoſe who have confirmed,

to suffer me to pass, I cannot demand the whole penalty, without surrendering the right which results from this obligation: otherwise I shall only have a right to part of the penalty. For I cannot receive the whole penalty and at the same time receive advantage from the principal obligation. *Molin. part.* 3. *n.* 442, 473.

354. The principle that the penalty is due only in proportion to the part for which the principal obligation was not performed, takes place even when the penalty consists in something indivisible. *Finge.* I sold you an estate, the price of which you paid me except fifty pistoles, which you bound yourself to pay me in twelve months; and we have agreed that on your failure to pay that sum within the time you should grant me a right of view over your house adjoining mine: I received of you twenty-five pistoles. On your failing to pay the overplus, I cannot exact the penalty for the whole, but only for the half for which the principal obligation was not performed, and as the penalty consists in a right of view, which is indivisible and not susceptible of parts, in demanding that you grant me the right of view, it will be necessary that I tender you payment of half of its value; the penalty being due me only for one half. *Molin. part* 3, *n.* 523, *& seq.* See *infra.*

ARTICLE IV.

Whether the penalty is incurred for the whole, and by all the heirs of the debtor, on the contravention of one of them.

It is necessary in deciding this question, to distinguish between divisible obligations and obligations indivisible.

§. I.

Decision of the question with regard to obligations indivisible.

355. When the primitive obligation which has been contracted under a penal clause is the obligation of an indivisible thing, the contravention of this obligation by one only of the heirs of the debtors causes the penalty to be incurred not only by the one who has contravened it, but also by his coheirs, who are liable for the penalty, in the proportion in which they are heirs, saving their recourse

againſt him, who by his contravention has occaſioned the forfeiture of the penalty, in order that they may be reimburſed by him.

For example; one has bound himſelf to permit me to paſs over his land adjoining the houſe which I occupy, as long as I ſhould occupy it, under the penalty of ten livres, in caſe of diſturbance. If one of the heirs of my debtor ſtop my way, although without the participation and againſt the will of his coheirs, the whole penalty of ten livres will be incurred, and it will be incurred by each of the heirs of my debtor, who will be reſpectively liable for it to the amount of their part in the inheritance. For that which is the object of the primitive obligation being indiviſible and not ſuſceptible of parts, the contravention of this obligation, which is made by one of the heirs of the debtor is a contravention of the whole obligation. It ought conſequently to occaſion the forfeiture of the whole penalty by all who are liable for it as heirs of the debtor who bound himſelf to the penalty in caſe of contravention.

This is the deciſion of Cato, in the law 4, §. 1, ff. *de Verb. oblig. Cato scribit: Pœna certæ pecuniæ promissa, si quid aliter sit factum, mortuo promissore, si ex pluribus heredibus unus contra quam cautum sit, fecerit, aut ab omnibus heredibus pœnam committi pro portione hereditaria, aut ab uno pro portione sua: ab omnibus, si id factum de quo cautum est, individuum sit, veluti iter fieri; quia quod in partes dividi non potest, ab omnibus quodam modo factum videtur.* Et ſeq. *Omnes commisisse videntur, quod nisi in solidum peccari poterit, illam stipulationem per te non fieri quominus mihi e, agere liceat.*

Paul decides the ſame queſtion in the law 85, §. 3, ff. *d. tit. Quoniam licet ab uno prohibeor, non tamen in parte prohibeor;* and he adds *sed cæteri familiæ erciscundæ judicio sarcient damnum.*

The heirs being bound for the penalty, each only for the part for which he is heir, are in this caſe different from debtors *in solidum*, who are debtors of the penalty for the whole, when it is incurred by one of them, as they are with regard to the principal obligation.

356. May the creditor demand the whole penalty from the heir who has made the contravention? The reaſon to doubt is that the law does not ſay it, and that it ſays on the contrary that the penalty is due by all the heirs, for their hereditary part alone. It is added that the contravention by the heir cauſes the penalty to be incurred, inaſmuch as this contravention is as the condition under which the obligation of the penalty was contracted by the anceſtor. This debt of the penalty which was contracted by the anceſtor, being a debt of the anceſtor and a diviſible one, the heir can be liable for it only in the proportion for which he is heir, and in which he ſucceeds in this quality to the debts of the anceſtor.

It muſt be decided, however, that the heir who contravenes the indiviſible obligation contracted by the anceſtor, becomes debtor of the penalty for the whole. It cannot be doubted that he is liable for it, at leaſt obliquely or indirectly: for being bound to indemnify his co-heirs for the part for which they are liable, the creditor ought to be admitted, in order to avoid a circuity of actions, to require the penalty from him not only for his ſhare, but alſo for that of his co-heirs, whom he is bound to indemnify, and conſequently he is liable for the whole.

Dumoulin, *part* 3, *n.* 173 & 174, & *paſſim alibi*, goes much farther and maintains that the heir owes the penalty for the whole not obliquely, but indeed directly. For the primitive obligation being ſuppoſed indiviſible, he is debtor of it for the whole, and debtor under the penalty ſtipulated. His contravening an obligation to which he is liable for the whole, ought to make him incur the whole penalty. This is proved by an argument from the law 9, ff. *depos.* which we have before quoted. It is there decided that the heir in part, of a depoſitary, who by his own act has occaſioned the loſs of the thing depoſited with his anceſtor, is liable for the whole damage to him who made the depoſit. In fact, although the principal obligation to reſtore the thing depoſited, is a diviſible obligation, the acceſſory obligation to uſe good faith in the preſervation of the thing depoſited, is

an indivisible obligation, for which each heir is liable for the whole, and which renders him debtor of the whole of the damages of the creditor, if he contravenes it. If an heir for part who contravenes by his own act an indivisible obligation of the ancestor, is debtor for the whole damages, he ought to be so for the whole penalty, since the penalty is in lieu of the damages, and is only a liquidation of them agreed upon by the parties themselves. Such is the reasoning of Dumoulin.

With regard to the first objection drawn from the paragraph *Cato*, this is the objection to it. When Cato decides that in the case of indivisible obligations, the contravention by one of the heirs causes the penalty to be incurred by each of them for their hereditary parts, he means to speak only of the heirs who have not participated in the contravention. As to the second objection, which is that as the obligation of the penalty, is an indivisible obligation contracted by the ancestor, each heir can be bound only for the part for which he is heir: the answer of Dumoulin is, that this is true when the heir is liable as heir, *tamquam hæres*, but when he is liable *ut ipse, & ex proprio facto*, he is liable for the whole, and this is one of his keys to determine questions on this subject. *Aliud est teneri hæredem ut hæredem, aliud teneri ut ipsum.* Tract. de Div. & ind. *part* 3, *n.* 5, & 112.

357. When an indivisible obligation is contravened by one of the heirs of the debtor, the heir who has contravened it being liable for the whole penalty, it follows that if the contravention has been made by one of several heirs, each heir is bound *in solidum* for the whol penalty; for the contravention of his co-heir does not diminish his own: *Nec qui peccavit, ex eo relevari debet, quod peccati consortem habuit: multitudo peccantium non exonerat, sed potius aggravat.* Molin. *ibid. part* 3, *n.* 148.

358. All we have said in this paragraph, with regard to the heirs of the debtor of an indivisible obligation, applies to several principal debtors, who have contracted to-

gether, not *in solidum*, under a penalty, an indivisible obligation. The contravention by one of them, binds the others to the payment of the penalty, each for his part, saving their recourse; and it binds, for the whole, him who has contravened. When the contravention has been made by several, it binds *in solidum*.

§ II.

Decision of the question with regard to divisible obligations.

359. When the primitive obligation contracted under a penal clause is that of a divisible act, Cato, in the paragraph above cited, seems to decide that the one of the heirs who contravenes the obligation, alone incurs the penalty, for the part for which he is heir. *Si de eo cautum sit quod divisionem recipiat, veluti amplius non agi, eum hæredem qui adversus ea facit, pro portione sua solum pœnam committere.*

The case in this law may be thus stated. A person bound himself to me, under a penalty of three hundred livres, to abide by the award of arbitrators, who have discharged me from a claim he pretended to have against me, for two hundred bushels of wheat. One of his heirs, who inherits a fifth of his estate, has, contrary to the faith of this agreement, sued me for his fifth of the two hundred bushels of wheat, which by the award it was adjudged I did not owe. He alone incurs the penalty stipulated, and he incurs it only for his fifth, which is his hereditary part. The reason is that the obligation is divisible, and as this heir can contravene it only for the part for which he is heir, he can consequently be liable only for part of the penalty. His coheirs, who, far from contravening this obligation, have performed it in part, in submitting for their part to the award, cannot be liable for this penalty. The creditor, who is satisfied as to their part of the award, cannot demand the penalty for their part, for he cannot be paid both the principal obligation and the penalty, as we have seen *supra*, *n.* 342, *& seq.*

The paragraph 4, *Si sortem*, of the law 5, *de tit.* seems contrary to this decision of Cato. It is there decided that

when one of the heirs of the debtor has discharged the obligation for the part for which he was liable, he, not the less, incurs the penalty, if his co-heir does not likewise perform the obligation, saving his recourse against his co-heir, who occasions the forfeiture of the penalty, by failing in the performance of his part of the obligation: *Si sortem promiseris, & si ea soluta non esset, pœnam; etiam si unus ex hœredibus tuis portionem suam ex sorte solverit, nihilominus pœnam committet, donec portio coheredis salvatur .... sed a coherede ei satisfieri debet; nec enim aliud, in his stipulationibus, sine injuria stipulatoris constitui potest.*

The interpreters, as well ancient as modern, have endeavoured to reconcile these two texts. Dumoulin relates several concordances of ancient interpreters, and refutes them all.

It is best to coincide with those of Cujas and Dumoulin, *Tract. de div. & ind. p.* 1, *n.* 62, & *seq.* which are alike. When the obligation is indivisible *tam solutione quam conditione*, when the intention of the parties, in adding the penal clause, has been simply to assure the performance of the obligation and not to prevent the payment of it from being made in parcels, by the several heirs of the debtor, especially when the act which is the object of the primitive obligation is such that it cannot be performed by the several heirs of the debtor, otherwise than by each for the part for which he is heir; in this case the decision of Cato ought to apply, the one of the heirs who contravened the obligation ought alone to incur the penalty, and for the part only for which he is heir. The act mentioned in the case in the paragraph *Cato, amplius non agi*, is the case of an act divisible *tam solutione quam obligatione*, and which, from the nature of the thing, cannot be performed by the several heirs of him who has contracted the engagement, otherwise than by each for the part for which he is heir. For each of these heirs succeeding only for his share to the right or pretension which the ancestor bound himself not to exercise, each of these heirs can only for his part contravene this engage-

ment, or execute it, in renewing or not renewing his pretenſions for the part he has.

On the contrary, when the obligation is diviſible, indeed, *quoad obligationem*, but indiviſible *quoad ſolutionem* and the intention of the parties was in adding the penal clauſe that the payment might not be made but for the whole, in this caſe each of the heirs, in diſcharging for his part the principal obligation, will not avoid the forfeiture of the penalty; and to this caſe ought to be confined the paragraph *Si ſortem*, which is reconciled with the paragraph *Cato*.

Dumoulin, *p.* 1, *n.* 72, gives as an example of the deciſion of the paragraph *Si ſortem*, the caſe of a merchant, who had ſtipulated with his debtor a certain ſum as a penalty, in caſe the principal ſum due him ſhould not be paid in a certain place during a particular fair. The tender which one of the heirs ſhould make him to pay his part ought not to prevent the penalty from being due for the whole, on failure of the payment of the whole ſum. Becauſe this merchant not being able to tranſact his buſineſs at the fair, without the whole of the ſum due him, the intention of the parties was, in ſtipulating the penalty, that it ſhould be incurred for the whole, on failure of the payment for the whole, and notwithſtanding the partial payment that might be made. For this partial payment cannot indemnify the creditor even for part of the injury which he ſuſtains from the delay of payment of the whole; and it is for the indemnification of the injury that the penalty is ſtipulated. Note, alſo that in the caſe of the paragraph *Si ſortem*, the penalty is ſtipulated for the delay, and not for the inexecution. Therefore the creditor ought to receive both the principal and the penalty.

The law 85, §. 6, *d. tit.* is alſo the caſe of an obligation diviſible, it is true, *quoad obligationem*, but indiviſible *quoad ſolutionem*; it is ſaid in the caſe of this ſtipulation *Si fundus Titianus datus non erit, centum dari; niſi totus detur, pœna committitur centum; nec prodeſt partes fundi dare ceſſante uno, quemadmodum nec prodeſt ad liberandum pignus, partes creditori*

solvere. Although the obligation *dare fundum Tusculanum* be an obligation divisible *quoad obligationem*, yet this obligation, whether it arises from a contract of sale, a contract of exchange or a composition, or in any other manner, is indivisible *quoad solutionem*, as the creditor has an interest in not taking a part of the land, having intended to purchase the whole. Therefore if one of the heirs of the debtor is in arrear to give his part of the land, the tender of the other heirs to give their parts, the transfer which they should even make of them to the creditor, who only accepted them provisionally and expecting the transfer of the rest, would not prevent the creditor from demanding the whole penalty, on offering nevertheless the parts which he had received. For he cannot have them both.

360. In the case of the paragraph *Si sortem*, when one of the heirs, for part, of the debtor, in neglecting to discharge the principal obligation for the part for which he is liable, has occasioned the forfeiture of the penalty, against the others who were ready to discharge the obligation for their parts, does he incur the penalty for the whole? He incurs it directly for the part only for which he is heir: for being liable for the principal obligation for his part; he can only contravene it for this part; then he can for this part only incur the penalty; for the penalty ought to be proportioned to the contravention. In this, divisible obligations differ from those which are indivisible. But although he be liable directly for this part only of the penalty, he is indirectly bound for the whole. For his co-heirs, who were ready to perform the obligation for their part, having incurred the penalty for their part, by his delay in performing his part of the obligation, he is bound to them, *judicio familiæ erciscundæ*, to indemnify them; *d. §. Si sortem*, to avoid an useless circuity of actions and the creditor may be received to demand from this heir the penalty not only for the part for which he is directly liable, but also for that of his co-heirs, for which he is bound to indemnify them, and consequently for the whole.

361. We have ſpoken thus far of the caſe in which the heir for part has failed to perform a diviſible obligation of the anceſtor, for the part for which he was liable. The inſtance in the paragraph *Cato*, and that in the paragraph *Si sortem*, although different from each other, as we have obſerved, are both put in this caſe. We may ſuppoſe another, for which there is no expreſs authority; it is the one in which the heir, for part, of him who had contracted, under a penal clauſe, a diviſible obligation ſhould contravene it for the whole and not for the part only for which he is heir.

For example. A perſon has let his land to farm, and leaves four heirs, one of whom evicts the tenant for the whole. On this caſe two queſtions ariſe, I. whether the penalty is incurred for the whole by this heir? II. whether it be incurred not only by him, but alſo by his co-heirs? The reaſon to doubt on theſe queſtions is, that this heir being liable as heir, only for the part for which he is heir, to continue the leaſe, he ought to be looked upon as a ſtranger for the reſt. The diſturbance he occaſions to the tenant, is only as heir for his part; for the reſt he diſturbs him as a ſtranger. Hence they conclude, that as the diſturbance which a ſtranger, without right, ſhould oppoſe to the enjoyment of the leaſe, would not occaſion the forfeiture of the penalty againſt this ſtranger, who would only have been liable for damages; nor againſt the heirs of the leſſor, who would have been holden to remit the rent to the tenant only in proportion to the eviction, in caſe of the inſolvency of the perſon who diſturbed him; ſo, in this caſe, the penalty ought not to be incurred by this heir in part, except for the part for which he is heir: he ought to be chargeable only with damages for the remainder and the penalty ought not to be incurred by his co-heirs. Yet, Dumoulin, who diſcuſſes this queſtion, *part* 3, *n.* 412, *& ſeq.* decides that in this caſe the penalty is incurred for the whole, by this heir in part, and that it is alſo incurred by his co-heirs, for the part for which each is heir. To eſtabliſh this deciſion and to refute at the ſame time the reaſoning which we have noticed, he diſtinguiſhes in this obligation to continue the

leaſe, and in all other kinds of diviſible obligations, two kinds of obligations, the principal obligation, as in this caſe that to continue the leaſe, which is diviſible, and the acceſſory obligation or that of good faith, which is indiviſible, and for which each heir is conſequently bound for the whole. The heir in part of the leſſor, who evicted the tenant, was, indeed, liable, as to the principal obligation for his part; but he was liable for the whole and indiviſibly, to uſe good faith. Good faith obliged him to oppoſe no diſturbance to the enjoyment of the leaſe, not only for his part, but alſo for the other parts. In evicting the tenant for the whole, he ought not to be conſidered as having treſpaſſed ſimply as a ſtranger with regard to the other parts, but as having contravened the obligation to uſe good faith, which he was under in his capacity of heir, even with regard to the other parts. This contravention being then, even with regard to the other parts and conſequently for the whole, the contravention of an obligation contracted by the anceſtor, under the penalty included in the agreement, it ought to occaſion the forfeiture of the penalty for the whole, againſt the heir who has contravened it. Such is the opinion of Dumoulin on the firſt queſtion. Dumoulin confirms his opinion by the following reaſoning. Were it true, ſays he, that in evicting the tenant from the whole, this heir ought to be conſidered to have contravened for his part only, and to be conſidered to have treſpaſſed as a ſtranger for the other parts, it would follow that the tenant would not, on account of his contravention for theſe parts, have the hypothecation reſulting from his leaſe on the property of the anceſtor. It would follow that although the leaſe was made under a ſeal giving juriſdiction, as that of the Chatelet of Orleans, the tenant could not proſecute the heir, who had evicted him, before the Bailli of Orleans, except for the part for which he is heir. This is what no one will pretend to ſay. Then this heir in part, in evicting the tenant, ought to be holden to have contravened the obligation, not only for his part, but for the others and for the whole, and conſequently he ought to incur the whole penalty ſtipulated in the caſe of contravention.

With regard to the second question, Dumoulin for the same reason holds that the penalty is incurred, not only by this heir, but also by each of his coheirs for the part for which they are heirs: for by the penal clause the ancestor bound himself and all his heirs to the payment of the penalty, in case of a contravention of the primitive obligation. It suffices then that there has been a contravention, for it to be said that the condition, under which the obligation of the penalty was contracted, has become accomplished, and consequently that all the heirs of the ancestor are liable.

If the ancestor had given securities *in omnem causam*, which securitiship extended as well to the primitive as to the penal obligation, the act of the heir who evicted the tenant would have bound the securities to the payment of the penalty; *a fortiori*, ought it to bind his co-heirs, who succeed to this obligation as principal debtors.

362. This decision on the second question applies even when the heir who has evicted the tenant would alone be bound by the primitive obligation to continue the lease, as in this case: I have leased a paternal estate to a tenant, under a penalty of two hundred livres, in case I fail in permitting him to enjoy the lease; I leave an heir to this paternal estate and several heirs of another line. This paternal heir prevents by his own act the lessee from enjoying the lease, *puta*, by selling the estate, without binding the purchaser to continue the lease. Although this heir is alone liable for the primitive obligation to continue the lease, according to the principle stated *supra*, *n.* 301, this obligation being the obligation of a certain determinate thing, to which he has alone succeeded, yet his contravention will occasion the forfeiture of the penalty, with regard to my other heirs, for the parts for which they are heirs. For the debt of the penalty is the debt of a sum of money, contracted by the ancestor, on the condition of this contravention, to which debt consequently, all the heirs of the ancestor succeed. They have recourse, however, against the one who contravened the obligation. *Molin. part.* 3, *n.* 430.

363. Another example may be given. A tenant for life has made a leaſe of the land, concealing the nature of the eſtate he had in it and pretending to be tenant in fee. There is a penalty of two hundred livres, ſtipulated for the benefit of the leſſee, if he be not ſuffered to enjoy. The tenant for life dies, leaving four heirs, one of whom is the proprietor of the land, and who as ſuch evicts the leſſee. The penalty is incurred by the four heirs; but he who evicted the leſſee is liable only for his part, and is not bound, as in the former caſe, to indemnify his co-heirs. For, having, as proprietor, the right of enjoying his own eſtate, he has not acted contrary to good faith. *Dolo non facit qui jure suo utitur.* He is liable for the violation of the leaſe and the penalty, in his capacity of heir only and therefore only for his hereditary part. *Molin. ib. n.* 432.

ARTICLE V.

Whether the penalty is incurred for the whole, and towards all the heirs of the creditor, by a contravention affecting one of them.

364. Paul, in the law 2, §. *fin de verb. oblig.*, determines this queſtion, in the inſtance of a penal ſtipulation added to an indiviſible primitive obligation. For example: You bound yourſelf by a compoſition to ſuffer me and my heirs to paſs through your park, a foot or on horſeback, and with beaſts of burden, under a penalty of twelve livres, in caſe of a contravention of this obligation: I have left four heirs; you prevented one of them from paſſing through the park and you ſuffered the other three to paſs. Paul determines that in this caſe the contravention being of an obligation indiviſible and not ſuſceptible of parts, cannot be a partial contravention, therefore the forfeiture of the penalty which it occaſions, it would ſeem *subtilitate juris*, ought to be incurred for the whole and to the benefit of all the heirs. Yet according to equity which in this caſe ought to prevail over the ſubtilty of the law, the penalty can be incurred towards him only to whom a paſſage was denied and only for his hereditary part: *Si stipulator decesserit qui stipulatus erit sibi hæredique suo agere licere; & unus ex hæredibus ejus prohibeatur; si pœna sit adjecta, in solidum committetur; sed qui non*

sunt prohibiti, doli exceptione submovebuntur, d. §. The reaſon is that equity does not allow that the three heirs to whom a paſſage through the park was allowed, ſhould, at the ſame time, reap the benefit of the performance of the obligation and receive the penalty ſtipulated in caſe of a contravention: nor that they ſhould complain of the contravention of the debtor towards their co-heir, in which contravention they had no intereſt: *Non debet aliquis habere simul implementum obligationis & pœnam contraventionis; & pœna quæ subrogatur loco ejus quod interest, non debet committi his qui non sunt prohibiti, & quorum nulla interest cohæredem ipsorum esse prohibitum; Molin. p.* 1, *n.* 32 & 35. The law 3, §. 1. *d. tit.* ſeems contrary to this. The reaſon is that Ulpian ſpeaks only *subtilitate juris.*

As the contravention of the obligation, made by the debtor towards one of the heirs of the creditor, occaſions the forfeiture of the penalty only with regard to this heir, and with regard to his hereditary part only, although the primitive obligation might have been indiviſible; a *fortiori* ought it to be ſo holden when the primitive obligation is a diviſible one.

CHAPTER VI.

Of the accessory obligation of securities and others, who accede to that of a principal debtor.

THIS chapter is divided into eight ſections, the ſeven firſt of which relate to ſecuritiſhip. We ſhall treat in the firſt of the nature of ſecuritiſhip. We ſhall ſee in the ſecond what are the different kinds of ſecurities. In the third we ſhall ſpeak of the qualifications which ſecurities ought to have. We ſhall ſee in the fourth, for whom, to whom, for what kind of obligations, and in what manner ſecuritiſhip is contracted. In the fifth, to what it extends. In the ſixth we ſhall ſpeak of the manner in which ſecuritiſhip is extinguiſhed, and the different exceptions or pleas,

which the law allows to ſecurities: In the ſeventh, of the action which the ſecurity has in his own right, againſt the principal debtor and againſt his co-ſecurities. In the eighth and laſt ſection, we ſhall treat of the other kinds of acceſſory obligations.

Section the First.

Of the nature of securitiſhip. Definition of securities, and the corollaries reſulting therefrom.

365. Securitiſhip is a contract by which one binds himſelf for a debtor to the creditor, to pay, in the whole or a part, what the debtor owes him, by acceding to his obligation.

We call a ſecurity him who contracts ſuch an obligation.

Securitiſhip, beſides the contract that takes place between the ſecurity and the creditor, includes alſo, in moſt caſes, another contract, which is preſumed to take place between the ſecurity and the debtor for whom the ſecurity binds himſelf; and this contract is the contract of mandate, which is always implied, when it is with the knowledge and approbation of the principal debtor that the ſecurity binds himſelf for him, according to the rule of law: *Semper qui non prohibet pro se intervenire, mandare creditur;* L. 60, ff. *de Reg. jur.* When the ſecuritiſhip has been entered into without the knowledge of the debtor for whom the ſecurity binds himſelf, it cannot be preſumed to include a contract between the ſecurity and this debtor; but there is preſumed in this caſe a kind of *quasi* contract between them, which is called *negotiorum gestorum.* We ſhall treat of the obligations which ariſe from the contract of mandate, or from the contract *negotiorum gestorum*, in the ſeventh ſection of this chapter.

The contract which takes place between the ſecurity and the creditor to whom he binds himſelf, is not of the claſs of contracts of beneficence; for the creditor receives nothing, by this contract, above what is due him: he only procures to himſelf a ſecurity for what is due him, without

which he would not have contracted with the principal debtor, or would not have granted him the terms he has granted: but the ſecuritiſhip includes a benefit to the debtor for whom it is entered into.

From the definition we have juſt given of ſecuritiſhip and ſecurities, ſeveral corollaries reſult.

First corollary.

366. The obligation of ſecurities being, according to our definition, an obligation acceſſory to that of the principal debtor, it reſults therefrom that it is of the eſſence of the obligation of ſecurities that there be an obligation of a principal debtor which is valid; conſequently, if he for whom the ſecurity has bound himſelf to you, was not your debtor, the ſecurity would not be liable, as the acceſſory obligation cannot exiſt without a principal obligation, according to this rule of law; *Cum causa principalis non consistit ea quidem quæ sequuntur locum habet;* L. 178, ff. *de Reg. jur.*

Second corollary.

367. A ſecond conſequence of our definition is, that the ſecurity, in binding himſelf for the principal debtor, does not diſcharge him from his obligation, but contracts another, which accedes to his. In this the ſecurity differs from him who is called in law *expromissor*, who binds himſelf to the creditor, in ſuch a manner that the creditor accepts him as the debtor in the room of the principal debtor, whom he diſcharges.

Third corollary.

368. It reſults from our definition, that the ſecurity can validly bind himſelf only to the payment of the ſame thing for which the debtor is bound, or of part of the ſame thing. Therefore if one has become ſecurity to me for one hundred buſhels of wheat, in favor of a perſon who owed me two thouſand livres, the ſecuritiſhip would be null. L. 42, ff. *de Fidej.* 222.

Contra, vice versa, one may validly become ſecurity to me for two thouſand livres, in favor of one who owes me one hundred buſhels of wheat. For money being the com-

mon thing by which all things are valued; he who owes me one hundred bushels of wheat of the value of two thousand livres, owes me in fact and validly two thousand livres, and consequently he who binds himself for him to pay me two thousand livres, does not bind himself to any thing different from what is due me by the principal debtor.

369. If one had bound himself to give me a certain piece of land, in fee, and another became his security that he should give me a life estate in it, would this securitiship be valid? Yes: for this part of the fee, being a right in the land which is due me, is in a manner part of the thing that is due me, and consequently it cannot be said that the security bound himself for a thing different from that due by the principal debtor. This is the decision of Caius in the law 70, §. 2, ff. *de Fidej. In eo*, says he, *videtur dubitatio esse, ususfructus pars rei sit an proprium quiddam? Sed cum ususfructus, fundi jus est, incivile est fidejussorem ex sua promissione non teneri.*

Fourth corollary.

370. It results from this definition, that the security cannot validly bind himself to more than that to which the principal debtor is bound: and as more is estimated not only *quantitate*, but also *die, loco, conditione, modo*, it results that the creditor cannot bind himself to harder conditions than the principal debtor; for the accessory obligation cannot surpass the principal; but he may bind himself to conditions more easy. Such is the decision of the law 8, §. 7, ff. *de Fidej. Illud commune est in universis qui pro aliis obligantur, quod si fuerint in duriorem causam adhibiti, placuit eos omnino non obligari; in leviorem plane causam accipi possunt.*

It results from this principle, that if one has bound himself for a determinate sum, *puta*, for three hundred livres, for a debtor, whose debt was unliquidated, the securitiship ought to be presumed to have been fixed to three hundred livres in favor only of the security, and only for the purpose that if by the liquidation that should afterwards be made, the debt amounted to a larger sum, the security

ſhould be bound only for three hundred livres. But if, by the liquidation, the debt was fixed at a leſs ſum, *puta*, two hundred and fifty livres, the ſecurity, who cannot owe more than the principal debtor, would be debtor only of two hundred and eighty livres, and if he had paid the three hundred livres mentioned in the contract of ſecuritiſhip, he would have a right to reclaim the overplus.

May the creditor in ſuch caſe, before the liquidation of the debt, compel the ſecurity to pay the three hundred livres proviſionally, notwithſtanding the latter ſhould require that the debt be liquidated, and ſhould contend that it does not amount to ſo much? The cuſtom of Brittany, *art.* 189, decides for the affirmative; but this deciſion ought not to be followed, out of that province. For according to the principle which we have eſtabliſhed, as the ſecurity cannot be bound for more than the principal debtor, he ought not to be compellable to the payment of the debt ſooner than the principal debtor: as the latter cannot be compellable till after the liquidation of the debt, *Ord.* 1661, *tit.* 33, *art.* 2, the ſecurity ought not to be compellable to pay before this. D'Argentre, in his note on this article of the cuſtoms above cited, admits that it is contrary to law, *contra Jus Romanum*, and in his commentary on the *art.* 206 of the old cuſtoms from which this is drawn, he ſays, *Hic se Authores Consuetudinis produnt non Jurisconsultos.*

571. According to this principle, when the principal debtor is bound abſolutely, the ſecurity may validly bind himſelf to pay within a certain time or on a certain condition; but on the contrary, if the principal debtor is bound only under a certain condition, ſtill depending, or within a certain time yet unexpired, the ſecurity cannot bind himſelf to pay preſently and on demand; *dicta lege*, 8, §. 7.

Note that if nothing be expreſſed in the contract of ſecuritiſhip, the time and condition expreſſed in the principal obligation are implied; ſo it is determined in the law 61, ff. *d. tit.* that the place of payment mentioned in the principal obligation is implied in the ſecuritiſhip.

372. If the principal debtor is bound to pay within a

certain period, the ſecurity may bind himſelf to pay within the ſame or a longer period; but he cannot bind himſelf to pay within a ſhorter one.

Hence it follows that when the principal debtor is bound to pay within a certain time, and the ſecurity binds himſelf to pay, under a certain condition, *as ſoon as* the condition is accompliſhed; this ſecuritiſhip will not be valid if the condition is accompliſhed before the time of payment, within which the principal debtor is bound to pay, is expired, L. 16, §. 5, ff. *de tit.* For if the ſecuritiſhip ſhould be valid, the ſecurity would be bound to pay before the debt might be demanded from the principal debtor, and conſequently *in duriorem causam*, which cannot be.

When the principal debtor is bound under a condition, the ſecurity may validly bind himſelf under this condition and another likewiſe; for in this caſe the ſituation of the ſecurity is better than that of the debtor, ſince he cannot be bound but on the accompliſhment of both conditions. If the ſecurity binds himſelf under the alternative of the condition under which the principal debtor is bound and of another condition, or ſimply under a different condition, the ſecuritiſhip will be valid, if the condition under which the principal debtor bound himſelf is firſt accompliſhed: but if the other is accompliſhed firſt, the ſecuritiſhip will not be valid, as the ſecurity cannot be bound before the principal debtor becomes ſo; L. 70, *pp.*° & §. 1, ff. *de Fidejuss.*

373. The place of payment may alſo render the obligation more difficult to be performed: therefore if the ſecurity had promiſed to pay in a more diſtant place than that in which the principal debtor is to pay, the ſecuritiſhip would not be valid, being made under a harder condition than the principal obligation; *d.* L. 15. §. 1 & 2.

374. If a perſon had bound himſelf to another to give him one or the other of two certain negroes, *puta*, James or John, which were nearly of the ſame price, would the contract, by which the ſecurity ſhould bind himſelf for the debtor to give John determinately, be valid? The law 54.

ff. *de Fidej.* decides that it is valid and that the ſituation of the ſecurity is, in this caſe, better than that of the principal debtor, ſince the ſecurity may be diſcharged by the death of John alone, whereas the principal debtor cannot be diſcharged but by the death of both.

Contra, if the principal debtor had bound himſelf to give John determinately, the contract by which the ſecurity ſhould bind himſelf to give John or James, would not be valid, not only for the reaſon we have given that this alternative condition is harder than the determinate one of James; but alſo for another reaſon, which is that if the ſecurity chuſe to give James, he would find himſelf to owe another thing than what was to be given by the principal debtor, who is debtor only of John; which cannot be, *ſupra n.* 368. This is the deciſion of the law 8, §. 1, ff. *d. tit.*

This is not to be apprehended in the laſt caſe in which the principal debtor promiſed John or James, and the ſecurity promiſed James determinately. For, in this caſe, if the principal debtor tenders James to the creditor, and puts him in arrear to receive it, in determining by this choice his obligation to deliver James, he diſcharges himſelf from the obligation to give John; and conſequently diſcharges his ſecurity from it. *Nam reo liberato, liberantur fidejussores.* The ſecurity who has acceded only to the obligation to give John, owes nothing more. If, on the contrary, the principal debtor had offered John, he would owe the ſame thing as his ſecurity: therefore it cannot happen, in this caſe, that the principal debtor and his ſecurity ſhould owe different things.

If the principal debtor had bound himſelf to give the negroes John and James, *at the choice of the creditor*, the ſecurity might validly bind himſelf to give the one of the two *which he pleased*, *d. L.* 8, §. 10. For the creditor preſerving his choice againſt the principal debtor, till the payment, the principal debtor would always be debtor of both negroes, and conſequently of that whom the ſecurity ſhould chuſe to pay.

375. A question is made whether the securitiship is entirely void, when the security has bound himself for more than the principal debtor; or whether it be void only for so much as exceeds the principal obligation? It appears that the Roman lawyers thought it was entirely void; though Dumoulin, *ad* L. 51, *Si stipulanti*, §. *Sed si mihi*, *n.* 30, *& seq.* wishes to make them say the contrary. This evidently results from the words of the law 8, §. 7, above cited, *placuit eos omnino non obligari*. It is true that Haloander, in his edition, reads *non omnino;* but he has, on his own private authority, altered the text, against the faith of the copies, and against the authority of the Greek interpreters, who consider these words *omnino non* to have the same meaning as *nullo modo*. This likewise results from the other texts above quoted. The reason which Connanus gives, *Comment. Jur.* 63, for this opinion of the Roman lawyers, is that securitiship being necessarily an obligation accessory to the principal obligation, and it being of the essence of an accessory obligation, that it contain nothing more than the principal, a contract of securitiship by which the security binds himself to something more, is defective in the essential form of securitiship, and must therefore be absolutely null. This reasoning, on which there is room to believe the Roman lawyers grounded their opinion, is more subtle than solid. From a securitiship being an accessory of the principal obligation, it follows only that when the security has bound himself to more, he is not validly bound to this addition: nothing ought to prevent him from being bound to the amount for which the principal debtor is liable. For by agreeing to be bound to a greater sum, he has agreed to be bound to the sum for which the principal debtor is liable. Therefore, as the Roman laws are followed in our provinces only when they are conformable to natural equity, I think they ought not to be followed in this instance, and that it is to be holden that a security who bound himself to a greater sum than the one mentioned in the principal obligation, or who bound himself to pay immediately what the principal debtor owed only at a future period, or under a certain

condition, is validly bound to pay the ſum mentioned in the principal obligation, on the terms and conditions there expreſſed. The cuſtom of Brittany, *art.* 118, has adopted this opinion, and Wiſſembach, *ad. Tr. de Fid. n.* 10, admits that, although it is contrary to ſome texts of law, it is followed in practice.

376. The principle which we have eſtabliſhed that the ſecurity cannot bind himſelf to harder terms than the principal debtor, *in duriorem causam*, ought to be underſtood with regard to what is due and what is the object of the obligation. The ſecurity cannot indeed owe more than is due by the debtor, *quantitate, die, loco, conditione, modo*, but as to the nature of the obligation, he may be harder and more ſtrictly bound.

For example, I. According to the principles of the civil law, the ſecurity who accedes to a mere natural obligation is more ſtrictly bound than the principal debtor; ſince he may be compelled to pay while the principal debtor cannot: the creditor having no action againſt him.

II. According to the ſame principles, when one has been ſecurity for a perſon who has what is called *exceptionem competentiæ*; as if one has been ſecurity for the father to the ſon, a creditor of his father; the ſecurity is more ſtrictly bound than the principal debtor. Since the ſecurity may be conſtrained, with all rigor, to pay the whole debt, while the principal debtor is compellable only to the amount of what remains of his eſtate, after deducting what is neceſſary for his ſubſiſtence, L. 173, ff. *de Reg. jur.*

III. The ſecurity of a minor is often more ſtrictly bound than the principal debtor, who may, if he has been overreached, be relieved againſt his obligation; whereas the ſecurity is bound without any hope of remedy. L. 13, *de minor*, L. 1, *Cod. de Fid. juss. minor.*

IV. According to our practice, a judicial ſecurity may be conſtrained by his perſon, although the principal debtor be not ſo; *puta*, if a prieſt, a minor, a woman, a ſeptuagenarian: he is therefore more ſtrictly bound, and as to the nature of the obligation, is bound *in duriorem causam.*

Fifth corollary.

377. It refults from our definition that, as the fecuritifhip is an acceffory obligation to that of the principal debtor, the extinction of the principal obligation carries with it the extinction of the fecuritifhip alfo, fince it is of the nature of acceffory things that they cannot exift without the principal thing. Whenever, then, the principal debtor is difcharged, in what manner foever, not only by the actual payment he may have made, by a fet-off or by a releafe given him by the creditor, the fecurity is alfo difcharged. For it being of the effence of the fecuritifhip, that the fecurity be bound for a principal debtor, he can no longer be bound, when there is no longer a principal debtor, for whom he may be bound.

378. Likewife, the fecurity is difcharged by the novation that is made of the debt: for the fecurity can no longer be bound for the firft debt for which he became fecurity of the debtor, fince it no longer exifts, having been extinguifhed by the novation. Neither can he be bound for the new debt into which the former is converted, fince this new debt is not the one to which he acceded, *Novatione legitimè perfecta debiti in aliam speciem translati, prioris contractus fidejussores, vel mandatores liberatos esse non ambigitur, si modo in sequenti se non obligaverint*; L. 4, *Cod. de Fidejus.*

379. Likewife when the principal debtor becomes fole and abfolute heir of the creditor, *aut vice versa*, when the creditor becomes fole and abfolute heir of the principal debtor, or when the fame perfon becomes fucceffively heir of both, the fecurity is difcharged, for there remains no longer a principal debtor, from the confufion that takes place of the qualities of creditor and debtor, which, happening to unite in the fame perfon, mutually deftroy each other; as no one can be his own creditor or his own debtor.

It would be otherwife, if the debtor had become heir of the creditor, with the benefit of inventory, *aut vice versa*. For one of the effects of the benefit of inventory being to prevent the confufion of qualities, and to diftinguifh the proper eftate of the heir from the beneficiary eftate, the

debtor, beneficiary heir of the creditor, remaining always debtor to the beneficiary eſtate, his ſecurities are not diſcharged: for there is ſtill a principal debtor.

When the creditor ſucceeds to his debtor, not as heir, but as univerſal donee, or univerſal legatee, by eſcheat or by confiſcation; as in all theſe caſes he is not indiſcriminately liable for his debts, but only to the value of the eſtate to which he ſucceeds, the confuſion takes place only to that amount. Hence it follows that the ſecurities are diſcharged no further; and if there be not, of the eſtate which the debtor has left, enough to pay the debt, the ſecurities remain liable for the reſt; but the creditor cannot proſecute them, until he has given them an account of the eſtate of the debtor to which he ſucceeds.

When the debtor becomes abſolute heir indeed of the creditor, but only for part, *aut vice versa*, the confuſion taking place only for the ſhare for which he is heir, his ſecurity is diſcharged only in that proportion.

389. When the principal debtor is not diſcharged *de pleno jure*, but by ſome plea or bar, which he may oppoſe to the demand of the creditor, may the ſecurity oppoſe the ſame plea or bar, which the principal debtor might. It is neceſſary, in this caſe, to diſtinguiſh between the pleas or bars which are called *exceptiones in personam* and thoſe that are called *exceptiones in rem*. The pleas *in personam* are thoſe which are grounded on ſome reaſons that are perſonal to the principal debtor. The pleas *in rem* are thoſe which are thus called becauſe they are not grounded on any thing that is perſonal to the debtor, but on the thing itſelf, which is to ſay, on the debt itſelf.

Theſe pleas *in rem* may be pleaded by the ſecurity as well as the principal debtor: *Rei cohærentes exceptiones etiam fidejussoribus competunt*; L. 7, §. 1, ff. *de except*; and it is with regard to theſe pleas that we are to underſtand what is ſaid in the law 19, ff. *de tit. Omnes exceptiones quæ reo competunt, fidejussori quoque, etiam invito reo competunt.*

Such is the plea of fraud or violence; ſuch is alſo the

plea of the thing judged, *rei judicatæ*, or the deciſory oath, *d.* L. 7, §. 1; for theſe pleas being founded on what has been ſettled by the judgment or deciſory oath, are pleas that affect the thing, and are not founded on any thing that is perſonal to the debtor, and conſequently are pleas not *in personam* but *in rem*; and theſe laſt pleas may be pleaded as well by the ſecurity as by the principal debtor in whoſe favor the judgment was, or to whom the oath was deferred. *Nec obstat regula juris*, that the judgment or deciſory oath can procure no right to third perſons not parties to the ſuit. L. 2. *Cod. Quib. res jud. non noc.*; L. 3, §. 3, ff. *de jur. jur.* for this rule ought not to be underſtood of thoſe whoſe right is eſſentially connected with that of the perſon who was a party, as the ſecurity is with the principal debtor.

When a principal debtor, by a compoſition made with the creditor reſpecting the legality of the debt, has agreed to pay it, on condition that three years ſhould be given him; the plea which this agreement gives againſt the creditor, if he ſues before that time, is alſo a plea *in rem*; for it is founded on the thing itſelf; it is founded on the doubt there was about the legality of the debt, which doubt was the object of the compoſition. This plea, therefore, may be pleaded by the ſecurity as well as the principal debtor, although he was not a party to the compoſition. Hence ariſes another queſtion, whether the debtor, by a new agreement with the creditor, may, to the prejudice of the ſecurity, permit the creditor to exact the debt before the time mentioned in the firſt agreement? Paul, in the law 27, §. 2, ff. *de Pact.*, decides formally that he may, although ſeveral interpreters, in order to reconcile this text with the law *fin.* ff. *d. t.* which decides differently, have diſtorted the text, in order to make it ſay the contrary. The reaſon of the deciſion of Paul is, that as the right which reſults from the firſt agreement has been formed by a concurrence of the will of the creditor and debtor alone, without the intervention of that of the ſecurity, it may be deſtroyed by a contrary conſent; *cum quæque eodem modo diſſolvantur quo obligata sunt.* On the contrary, Furius-Anthianus decides

that the new agreement cannot deprive the ſecurity of the plea he had acquired by the firſt. L. *fin.* ff. *de Pact.* and I think we ought to adhere to this deciſion. The reaſon alledged for that of Paul can apply only when there is no right acquired by a third perſon. Several interpreters whoſe opinion I have heretofore followed, in order to reconcile Furius-Anthianus with Paul, ſay that the deciſion of Furius applies only to the caſe in which the ſecurity has accepted and ratified the firſt agreement: but this concordance is conjectural. It is not ſaid in this law that the ſecurity had accepted the firſt agreement; this cannot even be ſuppoſed. For in ſuppoſing it, Furius would have ſtated as doubtful, a caſe on which no doubt could ariſe.

Let us paſs now to the pleas *in personam.*

Theſe pleas, which are grounded on the inſolvency or partial ſolvency of the principal debtor, and the perſonal privilege which he has, not to be compellable to pay out of his neceſſary ſubſiſtence, cannot be offered by the ſecurity. This is what we learn from the law 7, ff. *de except.* which teaches that the plea granted to a debtor, who ſhould be the parent, huſband, patron or partner of the creditor, to avoid being compelled to pay the debt, out of what is neceſſary to his ſubſiſtence, cannot be offered by the ſecurity. The reaſon is evident. The indigence of the principal debtor does not diſcharge him from his obligation, and were he afterwards to be in a better ſituation, he might be compelled to pay. In the mean time his obligation exiſts for the whole and is a ſufficient foundation to ſupport that of the ſecurity. His indigence does not extinguiſh it: it only ſuſpends the execution, on the ground that he cannot be compelled to pay out of what is neceſſary to his ſubſiſtence. But this plea being grounded on the relation in which he ſtands to the creditor, as parent, huſband, &c. which is perſonal to him, cannot be offered by his ſecurity.

It is the ſame with regard to the plea which reſults from the ceſſion of property. When the principal debtor has made a ceſſion of his property, which is not ſufficient

to pay what he owes, he is not discharged from the balance, L. 1. *Cod. qui bon. ced.*; and his obligation that remains for the balance, is a sufficient foundation to support the obligation of his security for the balance. Yet as long as he has not acquired other property, beyond what is necessary for his subsistence, he cannot plead to the suit of the creditor against him, the plea resulting from the cession of his property. L. 3, ff. *Cod. de bon. author. jud. de possid.*; L. 4, ff. *de cess. bonor.* It is evident that this bar is grounded on a reason of favor that is personal to the debtor; and it is *exceptio in personam*, which his securities cannot plead.

I think it is the same with the plea that arises from a contract of composition to which the creditor should have been compelled to accede, by which part of the debt is remitted to the debtor and time stipulated for the payment of the rest. I think that the pleas which this contract affords to the principal debtor, against the suit that might be brought before the expiration of the time allowed him by the contract, or to recover the part remitted, cannot be used by the security, who may be sued immediately for the payment of the whole debt. For it is evident that this is a plea *in personam*, allowed to the debtor on account of his state of indigence, which is personal to him. The remittance and delay granted by the contract of composition, not being granted *animo donandi*, but by necessity, the plea which results from this contract, like that in the preceding case, affects only the civil obligation. The natural obligation for what remains to be paid, continues in its totality and is a sufficient foundation for that of the securities. This reason is an answer to what has been alledged in the first place for the contrary opinion, which is in saying that it is of the essence of the contract of securitiship that the security be bound to no more than the principal debtor. As to the second position in favor of the contrary opinion, which is in saying that if the security had not the benefit of the contract of composition and might be bound to pay the whole debt, it would happen indirectly, that it could not avail the principal debtor himself on account of the recourse which the secu-

rity, who had paid the whole debt would have againſt him. The anſwer is, that this will not happen, becauſe the ſecurity who has paid the whole is, as a creditor of the ſum for his indemnity, bound like the other creditors, to accede to the contract of compoſition, and to allow to the principal debtor, on this indemnity, the ſame deductions as are ſtipulated in the contract. It is however neceſſary to admit that the contrary opinion is authoriſed by two caſes cited by Baſnage, one determined in the Parliament of Paris, the other in that of Normandy; the laſt is the 114th caſe reported by Montholon. But I do not think that the deciſion in theſe two caſes ought to be followed, for the reaſons above ſtated. This deciſion ſeems alſo to be contrary to the nature of the contract of ſecuritiſhip; which is a contract to which the creditor reſorts for his ſafety, againſt the riſk of the inſolvency of the principal debtor. What then would become of this ſafety if the creditor had not the right of exacting from the ſecurity what the inſolvency of the principal debtor ſhould bind him to remit to the principal debtor? Our opinion is conformable to the 13th article of the *Arretes de M. de Lamoignon*, under this title.

When there was an agreement between a creditor and the principal debtor, by which the creditor, in order to accommodate the principal debtor, had agreed not to demand from him the payment of the debt; if the creditor afterwards demanded the payment of the debt from the ſecurities, the ſecurities might indeed oppoſe to him, the plea reſulting from the agreement he had made with the principal debtor: but according to the ancient Roman law, the ſecurities had the plea only becauſe the ſuit, brought againſt the ſecurities, affected the principal debtor, who was bound to indemnify them, *actione contraria mandati aut negotiorum geſtorum*. Therefore, when the ſuit, brought againſt the ſecurities, could not affect the principal debtor, *futa*, becauſe the ſecurities had bound themſelves *animo donandi*, with proteſtation not to claim any thing from the principal debtor if they were obliged to pay for him, the ſecurities could not in this caſe, according to the principles

of the ancient Roman law, oppoſe the plea reſulting from the agreement that had taken place between the creditor and the principal debtor, becauſe as this agreement and the plea reſulting from it, were grounded on the perſonal conſideration which the creditor had for the principal debtor, whom he was willing to accommodate, it is a plea *in perſonam*, which does not belong to the ſecurities. This we learn from the law 32, ff. *de Pact.* where it is ſaid: *Quod dictum est, si cum reo pactum sit ut non petatur, fidejussori quoque competere exceptionem, propter rei personam placuit, ne mandati judicio conveniatur: igitur si mandati actio nulla sit, forte si donandi animo fidejusserit, dicendum est non prodesse exceptionem fidejussori.*

Even if the ſecurity were an ordinary ſecurity, who might have his recourſe againſt the principal debtor for what he ſhould be compelled to pay, he could not, according to the principles of the Roman law, oppoſe the plea reſulting from the agreement which had taken place between the creditor and the principal debtor, if by this agreement, the creditor, in promiſing not to demand the payment from the principal debtor, had expreſsly reſerved the power of demanding it from the ſecurity: *Debitoris conventio fidejussoribus proficiet, nisi hoc actum est, ut duntaxat a reo non petatur, a fidejussore petatur: tunc enim fidejussor exceptione non utetur;* L. 21, §. 5, *in fin.* 22, ff. *d. tit.*

Cujas, in his commentary on the paragraph 5, before cited, obſerves very properly, that in this ſecurities differed from thoſe who were called in law *mandatores pecuniæ credendæ;* for if, at your requeſt, I had lent another a ſum of money, I could not afterwards, by agreeing with the debtor that I would not demand from him the payment of the debt, validly reſerve to myſelf the right to demand it from you. He gives this reaſon for the diſtinction. When, at your requeſt, I have lent a ſum of money to another, I am, from the nature of the contract of mandate that has taken place between us, bound to cede to you the action that reſults from the loan I made in the execution of your mandate;

every mandatary being bound, *actione mandati directa*, to account to the mandator for all he has received in the execution of the mandate. Therefore, when by my own act I have disabled myself from performing my obligation to you, and to cede to you the action that results from the loan I made to the debtor, either by agreeing with the debtor not to demand any thing from him, or by suffering, through my own fault, a judgment to be rendered against me in a suit I had brought, or in any other manner, I ought not to be allowed to claim from you, *actione mandati contraria*, the sum which I lent by your order to this debtor. L. 95, §. *pen.* ff. *de Solut.*: for it is a principle common to all synallagmatic contracts, that the party who fails in his obligation, is not to be received to demand from the other party the performance of his.

It is not the same with securities. A creditor according to the principles of the antient Roman law, as Cujas observes, *ad. d.* §., does not contract any obligation to the securities to keep for them his actions against the principal debtor, against whom they have one in their own right. It is from a reason of equity merely, that he cannot refuse the cession of them to the security when he pays; but he is bound only to cede them such as they are; therefore the agreement he made with the debtor, by which his action has been rendered ineffectual, does not preclude him from demanding from the security the payment of the debt.

Such was the antient law, which, as Cujas observes, *ed d.* §. 5, can hardly apply since the novel of Justinian: *Jure novo*, says Cujas, *haud facile procedere potest*: for Justinian having, by his novel, granted to securities the benefit of discussion, *beneficium ordinis*, which consists in the right it gives them, when they are prosecuted by the creditor, to send him back to prosecute, first, the principal debtor, and to discuss, for this purpose, his property, it is evident that the creditor cannot now, by agreeing with the debtor not to demand from him the payment of the debt, reserve to himself the right to demand it from the securities; for he can-

not, by his own act, deprive them of the right and the plea which the law gives them.

According to the principles of our juriſprudence, beſides this reaſon derived from the novel, that a creditor may not, in agreeing with his debtor not to demand the debt from him, reſerve to himſelf the right to demand it from the ſecurities, there is another reaſon which is no leſs deciſive; it is derived from the difference in the civil law and ours, on ſimple pacts.

According to the principles of the civil law, they were only the obligations which had been formed by the ſole aſſent of the parties, that might be diſſolved by a contrary aſſent. With regard to all others, when the creditor wiſhed to releaſe any of them to the debtor, he could do it only by the acceptilation, either ſimple or Aquilian: without this the agreement he had made with the debtor, not to demand the debt from him, was a ſimple pact which could not diſſolve the obligation of the debtor; for as a ſimple pact cannot produce a civil obligation, it cannot diſſolve one. It is true that this gave to the debtor a plea to preclude the creditor from the ſuit he might have brought againſt him, contrary to the faith of the agreement; but the debtor had a right to this plea only from the equity of the Prætor againſt the rigor of law: the obligation he had contracted ſtill continued, *ipso jure*, in his perſon, and was a ſufficient foundation to ſupport that of the ſecurities who had acceded to it.

It was ſo likewiſe when the creditor had agreed, through liberality, to grant a certain time to the debtor who had firſt contracted an abſolute obligation, without any time of payment. This agreement was but a ſimple pact which only afforded to the creditor a plea againſt the ſuit which the creditor, contrary to the faith of the agreement, might have brought before the time. But if by the agreement the creditor had declared that he intended to grant the time to the debtor alone and not to the ſecurities, this agreement, according to the principles of the antient law, did not pre-

vent him from ſuing the ſecurities, before the end of the time; and they could not oppoſe to him the principle, that it is of the nature and eſſence of ſecuritiſhip that the ſecurity be not bound to more than the principal debtor, and ſhould have the ſame time of payment: for the agreement by which a time has been granted to the debtor, being only a ſimple pact, could not impair his obligation or diminiſh it; it continues *ipso jure*, as it was contracted, an obligation without a time of payment, and it leaves that of the ſecurities likewiſe to continue. If the debtor may have the advantage of the delay that has been granted him by the agreement, it is an advantage which he holds only from the equity of the Prætor againſt the rigor of the law, and which, being grounded on a conſideration perſonal to the debtor, does not paſs to his ſecurities.

Theſe principles of the civil law, on the effect of ſimple pacts, are not derived from natural law, and are grounded only on ſubtilties very much oppoſed to the ſpirit and ſimplicity of our juriſprudence. We are not acquainted with the ſolemnity of acceptilation. Every agreement may create a civil obligation, diſſolve or modify it. When a creditor has agreed with the debtor not to demand the debt from him, this agreement, according to the ſimplicity of our law, diſcharges the debtor *de jure*. Therefore the creditor cannot validly reſerve to himſelf the right of demanding payment from the ſecurities: the diſcharge of the debtor, neceſſarily carries with it that of the ſecurities.

Likewiſe, in our juriſprudence, when, ſince the contract, a creditor grants, through liberality, a day of payment to his debtor, he cannot validly exclude the ſecurities from this delay; for this new agreement having the effect to modify, *de jure*, the obligation of the debtor and to make of an abſolute obligation an obligation with a day of payment, the obligation of the ſecurities receives the ſame modification, and has the ſame time of payment as the obligation of the principal debtor, becauſe it is of the eſſence of a ſecuritiſhip, that the ſecurity be not bound to any more than the principal debtor.

If, in the case of a contract of composition made between the creditor and the debtor, the securities do not enjoy the allowance and delay granted to the debtor, as we have seen before, it is because those allowances and delays that are granted to the debtor by this contract, affect only the civil obligation. The natural obligation remains entire, in consequence of which, the debtor himself, were he to have the opportunity of paying, could not conscientiously avail himself of the allowances and delays that were granted him. This natural obligation suffices, as we have said, to serve as a foundation for that of the securities. But when the creditor, of his own accord and through liberality, discharges the debtor or gives him a time of payment, the debtor being no longer bound, naturally or civilly, to pay the sum which has been remitted; being no longer bound, naturally or civilly, to pay before the time is expired; it follows, consequently, that the securities should be no longer bound.

581. When the principal debtor obtains a restitution against his obligation by letters of rescission, does this rescission carry with it the rescission of the obligation of the securities? The same distinction is to be made as before. If the rescission is grounded on some actual defect in the obligation, as fraud, violence, error, enormous lesion, the rescission of the principal obligation carries with it that of the securities. If, on the contrary, the rescission is grounded on reasons that are personal to the principal debtor, as, for example, his non-age, in this case the rescission which he obtains of this obligation does not carry with it that of the securities. The principal debtor, by the rescission of his obligation, obtains only a plea which is personal to him against his creditor, and his obligation, notwithstanding the rescission of it, exists in a manner *naturaliter*, and is a subject to be acceded to by the securities. This is the decision of the law 13, ff. *de minorib.* and, very explicitly, of the law 1, *Cod. de fidejus. min.*

There is however a case in which the rescission of the principal obligation, although for the mere reason of non-

age, carries with it that of the obligation of the securities. It is when the principal debtor bound himself in a capacity which the judgment of rescission has destroyed, as if he bound himself in the capacity of heir, and he obtains the rescission of his acceptance of the inheritance. For the principal debtor not being bound in his own right, but in the capacity of heir, which he no longer has, and which he lost by the rescission, he is no longer debtor, not even *naturaliter*; his obligation, attached to a capacity that is destroyed, has ceased. This is the decision of the law 89, ff. *de acquir. hered.*

382. The rule we have established, that the extinction of the principal obligation carries that of the security, suffers a kind of exception in the case in which the thing should have perished by the fault of the security, or since he has been put in arrear. In this case though the obligation of the principal debtor, who was not put in arrear, be extinguished by the destruction of the thing that was the object of it, the security remains bound. This is the decision of the law 32, §. 5, *de Usur. Si fidejussor solus moram fecerit, reus non tenetur, sicuti si Stichum promissum acciderit; sed UTILIS ACTIO in hunc (fidejussorem) dabitur.* This was established against the maxim which does not permit the obligation of the security to continue after the extinction of that of the principal debtor; which the Jurist teaches us by saying that in this case the action given against the security is *actio utilis*, that is to say, which is given *contra tenorem juris, ita suadente utilitate & æquitate*, by way of damages and as a punishment of the fault the security.

Sixth corollary.

383. From the security's being, according to our definition, he who binds himself for another and who accedes to the obligation of another, the Roman lawyers had drawn this consequence, that whenever the two capacities of principal debtor and of security of this debtor met in the same person, which happens when the security becomes heir of the principal debtor, *aut vice versa*, when the principal debt-

or becomes heir of the debtor, or when a third perſon becomes heir of both, in all theſe caſes the capacity of principal debtor deſtroyed that of ſecurity; as a ſecurity is, eſſentially, one who is bound for another, and as no one can be the ſecurity of himſelf. Hence they concluded that the obligation of the ſecurity was extinguiſhed, and that nothing remained but the principal obligation. L. 93, §. 2, *in fin.* ff. *de Solut.* L. 5, ff. *de Fid.* L. 24, *Cod. de Fidej.*

Hence they concluded that if the ſecurity had himſelf given a ſecurity, who acceded to his obligation, in all theſe caſes the obligation of this ſecurity of the firſt ſecurity was extinguiſhed by the extinction of the obligation of the firſt ſecurity, which was like a principal obligation in regard to that of this ſecurity of the ſecurity. L. 38, §. *fin.* ff. *de Solut.*

In our juriſprudence, this nicety is not obſerved, and a ſecurity of a ſecurity, *fidejussor fidejussoris*, is not diſcharged becauſe the ſecurity for whom he has been ſecurity has become heir to the principal debtor, *aut vice versa*. There is room to think the Roman Juriſts were divided on this queſtion, *d.* L. 83, §. *fin.* and although it ſhould be holden, according to the civil law, that there is a confuſion of the obligation of the ſecurity, the hypothecation given by this ſecurity would ſtill continue, for hypothecations are extinguiſhed only by payment, and the confuſion which, according to the ſubtilty of the law, diſcharges the ſecurity, in his capacity of ſecurity, is not equivalent to a payment; this is the deciſion of the law, *d.* L. 38, §. *fin.*

When the ſecurity becomes heir of his co-ſecurity it is not to be doubted that there is then no confuſion, and that both the capacities remain, though united in the ſame perſon; L. 21, §. 1, ff. *de fidejuss*; as the two obligations continue when the principal debtor ſucceeds to his principal co-debtor, L. 5, ff. *d. tit.*

384. From its being of the eſſence of the obligation of the ſecurity to accede to the obligation of the principal debtor, it is not therefore to be concluded that it is extin-

guiſhed when the principal debtor dies without leaving any heirs. The reaſon to doubt is that there remains no principal debtor to whoſe obligation the ſecurity may accede. The reaſon to decide, which may alſo ſeem an anſwer to this objection, is that the eſtate of the principal debtor, though vacant, repreſents him and takes the place of his perſon, according to the maxim *hæreditas jacens personæ defuncti vicem sustinet*; conſequently there remains, at leaſt *fictione juris*, a principal debtor to whoſe obligation that of the ſecurity accedes; *vice versa*, when the creditor to whom the ſecurity became bound, dies without leaving any heirs, his eſtate repreſents him and is a fictitious perſon in whoſe favor the ſecuritiſhip continues to exiſt.

385. When the ſecuritiſhip was entered into in favor of a creditor, in a certain capacity which this creditor had, the ſecuritiſhip continues in favor of the perſon to whom that capacity paſſes. For example. If I have been ſecurity for the debtor of an eſtate, to the heir, in his capacity of heir; this heir having ſince relinquiſhed the eſtate to a perſon for whom it was holden in truſt, and to whom the capacity of heir and all the hereditary rights have paſſed, the ſecuritiſhip continues in favor of the *cestui que trust*; L. 21, ff. *de Fidej.*

§. II.

Diviſion of ſecurities.

386. We have in our juriſprudence three kinds of ſecurities: conventional ſecurities, legal, and judicial ſecurities.

Conventional ſecurities are thoſe who intervene by the agreement of the parties in different contracts, as in the contracts of ſale, hire, loan, &c. For example. One borrows money and gives a ſecurity, who binds himſelf to the lender for the return of the money; one buys a thing or hires it, and gives a ſecurity who binds himſelf with him for the payment of the price: ſuch ſecurities are *conventional securities*; they are not by law, nor are they ordered by the judge: it is the ſole agreement of the parties which

cauſes them to intervene, becauſe the borrower, buyer or bailee to hire, has agreed with the lender, vendor or bailor, to give ſecurity.

Legal ſecurities are thoſe which the law requires to be given, ſuch as a mutual donee or legatee is bound to give before he receives what is given or bequeathed to him, &c.

Judicial ſecurities are thoſe which the judge requires to be given. As when the judge decrees that a perſon may receive proviſionally a ſum of money, on giving ſecurity to reſtore it, if it be ſo decreed afterwards.

SECTION III.

Of the qualifications which a security ought to have.

§. I.

Of the qualifications a perſon ought to have, in order to contract validly a ſecurityſhip.

387. It is neceſſary, the firſt of all, that the ſecurity be able to contract and bind himſelf as a ſecurity.

All thoſe who are incapable of contracting, as idiots, perſons interdicted, minors, feme coverts not authoriſed by their huſbands, monks profeſſed, cannot be ſecurities.

388. According to the civil law women could not bind themſelves as ſecurities for others; the Velleian ſenatus-conſultus invalidated their obligation.

Juſtinian by his novel, 134, *cap.* 8, permitted women, in binding themſelves, to renounce the plea given them by the ſenatus-conſultus.

This principle was heretofore obſerved with us: but as the clauſe renouncing the Velleian ſenatus-conſultus, which had become a matter of courſe in all notarial inſtruments, rendered it ineffectual, and was only a ſource of law-ſuits, King Henry IV entirely abrogated, by his edict of 1606, the Velleian ſenatus-conſultus; conſequently it has ceaſed to be law in the juriſdiction of the Parliament of Paris, who regiſtered this edict.

In Normandy, where the edict was not regiſtered, the

Velleian ſenatus-conſultus is obſerved in all its rigor, and the novel permitting women to renounce it, is not followed.

In this diverſity of juriſprudence, the law of the place where the woman dwelt when ſhe contracted the ſecuritiſhip, is to be followed. For the laws that regulate the obligation of perſons, ſuch as the Velleian ſenatus-conſultus, which diſables women from binding themſelves for others, are ſtatutes *in personam* extending their power over all perſons ſubject to them by dwelling within the diſtrict in which they are in force, wherever may be their property and wherever they may contract. Therefore if a woman dwelling in Normandy becomes ſecurity for another, though the contract of ſecuritiſhip may have been entered into in Paris, where the Velleian ſenatus-conſultus is abrogated, the ſecuritiſhip would be null.

But although a woman was married in Normandy, if her huſband removes his reſidence to Paris, this wife having ceaſed by the change of her place of reſidence to be bound by the laws of Normandy, any ſecuritiſhip ſhe may enter into ſince her arrival, will be valid.

The perſonal obligation which a woman of Normandy has contracted in becoming ſecurity for another, being null, it follows as a conſequence that the hypothecation of her property under which ſhe has bound herſelf, is likewiſe null. Even when it is ſituated within the juriſdiction of the Parliament of Paris. The hypothecation cannot exiſt without the perſonal obligation to which it is an acceſſory.

Vice versa. If a Pariſian woman becomes ſecurity before a notary-public, her property though ſituated in Normandy, will be hypothecated, this hypothecation being a conſequence of the obligation which ſhe contracted by a notarial inſtrument.

This objection will be made; it is admitted that the Velleian ſenatus-conſultus is a ſtatute *in personam* with regard to the firſt part of it, which diſables women from binding

their perſons for others. But it has a ſecond part which diſables them from binding their property for the debts of others. This ſenatus-conſultus having for the object of its ſecond part, things, it is, as to this ſecond part, a ſtatute, *in rem*, and, according to the nature of ſuch ſtatutes, its power extends to every thing ſituated in the diſtrict within which it is in force, whoever may be the perſon who is the owner of it: therefore it avoids the hypothecation which a woman, tho' perſonally ſubject to its power, makes of her property ſituated in Normandy, for the debt of another.

My anſwer is, that this argument proves only that if a Pariſian woman, without becoming ſecurity for another, and without binding herſelf perſonally, bound her property ſituated in Normandy for the debts of another, her obligation would be void, becauſe the Velleian ſenatus-conſultus obſerved in Normandy, and binding the property ſituated within that province, avoids ſuch an obligation for the debt of another. But when the obligation of her property is only a conſequence of a perſonal obligation which the Pariſian woman has contracted before a notary-public, the law of Normandy cannot invalidate it; for this law, having no effect on the perſonal obligation of a Pariſian woman, can have none on what is only an acceſſory to it.

The Velleian ſenatus-conſultus being a ſtatute *in perſonam* only with regard to its firſt part, and being a ſtatute *in rem* with regard to the ſecond, it follows that a woman of Normandy may, in not becoming ſecurity and contracting no perſonal obligation, bind, for the debt of another, her lands ſituated out of Normandy, in ſome province in which the Velleian ſenatus-conſultus is abrogated; for ſtatutes *in rem* extend their power only over things ſituated within the diſtrict in which they are in force.

339. Minors, though emancipated, may not validly bind themſelves for others; for emancipation gives them the power only of adminiſtering their eſtates, and it is evident that becoming ſecurity for the affairs of another, does not make part of this adminiſtration.

This applies even with regard to a merchant minor who ſhould be ſecurity for another merchant, in a mercantile affair, in which he ſhould have no intereſt; for his quality of merchant gives him no power to contract without hope of reſtitution except for affairs relating to his trade; the affairs of another merchant, in which he has no intereſt, are not affairs of his trade. *Basnage. Traite des Hypot. part* 2, *chap.* 2. *Despeisses, Traite des Cautions*, §. 1.

For the ſame reaſon, a minor who, by a diſpenſation from the Prince, exerciſes a public office, is not the leſs to be relieved from a ſecuritiſhip he may have entered into. For the diſpenſation of the Prince makes him to be preſumed of age only in regard to what relates to the public office which he permits him to exerciſe. Hence it is only with regard to engagements relative to the diſcharge of his office, that he may contract without hope of reſtitution: theſe principles are certain, notwithſtanding the caſe reported by *Despeisses, ib.*

There are caſes extremely favorable, in which the ſecuritiſhip of a minor may be valid. For example; a minor has been determined not to be relievable againſt his ſecuritiſhip, entered into to releaſe his father from priſon.

The ſecuritiſhip of a minor for this cauſe ought, above all, to be confirmed, if the father could not ſhare the benefit of a ceſſion of goods to procure his releaſe, and when the ſecuritiſhip did not occaſion an exceſſive detriment to the affairs of the ſon. But if the father might have made the ceſſion of his goods, the minor ought to be relieved, who ſubmitted to a conſiderable ſecuritiſhip that was not neceſſary. The age of the minor may alſo be regarded. He who was near being of age ought with leſs facility to be relieved againſt his ſecuritiſhip than he who was of an age not ſo much advanced. Baſnage pretends that the ſecuritiſhip of a minor would not in this caſe be liable to be revoked; it is neceſſary that the minor be at leaſt of the age of eighteen; which is the age of puberty complete, and that at which children were bound by the novel 115, *cha-*.

3, §. 13, under pain of disinherison, to redeem their captive father. He cites a case in which the securitiship of a minor of the age of sixteen, for this cause, was annulled. In all these cases great regard is to be paid to circumstances. Hence the difference in the cases reported by Brodeau on Louet, L. A. *chap.* 9.

§. II.

Of the qualifications requisite for one to be received to be a security.

390. When a debtor is bound either by the law, the judge, or his own agreement, to give security to his creditor; in order that the security may be received, it is not sufficient that he have the above qualification which is required, the first of all, and which consists in being able to bind himself as a security; it is necessary, besides, I. that the security be solvent and have property sufficient to satisfy the debt he accedes to.

When the creditor to whom the security is offered, contests his solvency, the security ought to justify it by producing his titles to the real property he possesses; otherwise he ought to be rejected.

In judging of the solvency of a security, and whether his property be sufficient to answer the debt, no regard, commonly, is paid to his personal property, because that kind of property is easily disposed of and cannot be hypothecated: yet when the debt is small and the time of payment not far off, merchants well established in trade are received, though their fortune consists entirely of personal property. *Basnage, ibid.*

Neither is any regard paid to real property the title to which is disputed; nor such as is situated at a great distance; as it would be difficult to discuss it. *ibid.*

II. The security must be a resident in the place, which is to say, within the jurisdiction of the court, that it may not be too difficult to discuss the property. *Fidejussor locuples videtur non tantum ex facultatibus, sed ex conveniendi facilitate;* L. 2, ff. *Qui satisd.* In this case more indulgence

is shewn to those who are required by law or by the judge to give securities, than to those who submitted to do so by their own agreement. The latter ought not to be allowed to say they cannot find any on the spot, having of their own accord submitted to give securities, *sibi imputare debent:* the former ought to be easily permitted to give persons of their neighbourhood, when they cannot find any in the place in which the securities are required. *Basnage, Des-peisses.*

III. For the same reason, if a person of power was offered, the creditor might refuse him: so he might reject a person who having the privilege of a particular court, might take the creditor out of the jurisdiction of the place, or a military man who might obtain letters of state. *Basnage, Traite des Hypot. p.* 2, *ch.* 2.

Another qualification required in those who are offered as securities, is that they be subject to an imprisonment: therefore they may reject, for judicial securities, women, clergymen in sacred orders, and septuagenarians; because these persons are not liable to be so constrained.

As to the form of receiving securities, see *Ord. of* 1667, *t.* 28.

§. III.

Of the cases in which the debtor is bound to give another security in place of the one who has been received.

391. If the security had the necessary qualifications when he was received, and has since ceased to have them, *puta*, if from being solvent, he has now become insolvent, will the debtor be obliged to give another? A distinction is to be made. He will be obliged to do so in the case of a legal or judicial security. *Si calamitas insignis fidejussoribus vel magna inopia accidit, ex integro satisdandum erit.* L. 10, §. 1, *Qui satisd. cog.* L. 4. ff. *stipul. præt.*

If it be a conventional security, a sub-distinction is to be made. If I bound myself to give a security indeterminately, and in performance of this obligation I gave one who has since become insolvent, I shall be bound to give another.

But if I contracted at firſt, with A. B. my ſecurity, or bound myſelf to give A. B. for a ſecurity, and A. B. afterwards becomes inſolvent, I ſhall not be compelled to give another, becauſe I promiſed only to give for a ſecurity the perſon whom I have given.

392. It remains to inquire whether he who is bound to give a ſecurity, may be received to give in lieu of it pledges ſufficient to anſwer the debt. For the negative this maxim is alledged, *aliud pro alio invito creditori ſolvi non potest*; which chiefly applies when the thing offered ſhould be better: hence it ſeems to follow that a creditor to whom a ſecurity is to be given, cannot be compelled to receive pledges inſtead of it. Nevertheleſs he who is to give a ſecurity ought eaſily to be permitted to give pledges inſtead of it, when he cannot obtain a ſecurity. Becauſe he to whom the ſecurity is to be given, having no intereſt but his ſafety, which pledges will as well and better provide for, *cum plus cautionis ſit in re quam in persona, & tutius ſit pignori incumbere quam in personam agere*, it would be, on his part, mere ill nature to refuſe the pledges, in lieu of a ſecurity, if what is offered in pledge can be kept without any trouble or riſk. *Basnage, ibid.*

SECTION IV.

For whom, to whom, for what obligation and how securitiship may be entered into.

§. I.

For whom and to whom.

393. One may become a ſecurity for any debtor whatever, even for a vacant eſtate, *cum personæ vicem sustineat*, L. 22, ff. *de Fidej.*; and likewiſe to any creditor of the perſon for whom one binds himſelf. One may likewiſe become a ſecurity for minors, idiots, interdicted prodigals, in all caſes in which thoſe perſons may, without any act of their own, become bound. For example. If I have uſefully managed the affairs of a minor or an interdicted prodigal, this minor or interdicted prodigal, being in this caſe bound to

me, *ex quasi contractu*, to reſtore the ſums I have diſburſed in the management of his affairs, and which have turned to his profit, one may, as to theſe ſums, become ſecurity for him. It is in this ſenſe, Cujas teaches us that we ought to underſtand the law 25, ff. *de Fidejuss.*, which ſays: *Si quis pro pupillo sine tutoris autoritate obligato, prodigove, vel furioso fidejusserit, magis esse ut ei non subveniatur.* This explanation removes the contrariety, which Baſnage finds between this law and the law 6, ff. *de Verb. oblig.* which ſays; *Is cui bonis interdictum est.... non potest promittendo obligari, & ideo nec fidejussor pro eo intervenire potest.* For as in the preceding caſe, the interdicted prodigal ought to be validly bound, on the contrary, in this he is not bound, being incapable of contracting. Hence it follows that his ſecurity is not bound, as there cannot be a ſecuritiſhip without a principal obligation. *Supra*, n. 366. Gaius proves clearly our diſtinction, in the law 70, §. 4, ff. *de Fidejuss. Si a furioso*, ſays he, *stipulatus fueris, non posse te fidejussorem accipere certum est. Quod si pro furioso jure obligato fidejussorem acceperis, tenetur fidejussor.*

It is evident that one cannot be a ſecurity for one's ſelf. L. 21, §. 2, ff. *d. tit.* nor to one's ſelf.

394. One can be a ſecurity only to the creditor of him for whom he becomes ſecurity: the ſecuritiſhip which one might contract to a perſon not his creditor, but who has power only to receive the debt, would not be valid; L. 23, ff. *d. tit.*

§. II.

For what obligation.

395. One may become a ſecurity for the performance of any obligation whatever: *Fidejussor accipi potest, quoties est aliqua obligatio civilis vel naturalis, cui applicetur;* L. 16, §. 3, ff, *d. tit.*

Obſerve that the natural obligations for which it is ſaid, under this head, that ſecurities may intervene, are thoſe for which the municipal law does not grant an action; ſuch are thoſe formed by a ſimple pact, thoſe contracted by ſlaves,

and which were not beſides forbidden by law: but ſecurities cannot validly intervene for obligations forbidden by law, although they may be binding in *foro conſcientiæ*, and may in this ſenſe be called natural obligations.

It is upon this principle the laws decide that a ſecurity cannot validly accede to the obligation of a woman who has bound herſelf contrary to the prohibition of the Velleian ſenatus-conſultus; L. 16, §. 1, ff. *ad ſen. vell.*; L. 14, *Cod. d. tit.* For although in *foro conſcientiæ*, this woman may be bound to perform her obligation, yet as the obligation has been contracted againſt the prohibition of the law, it is in *foro legis*, regarded as null, and it cannot conſequently ſerve as a foundation to the obligation of a ſecurity. The law in annulling the obligation of the woman, annuls every thing dependent on it, and conſequently the contracts of ſecuritiſhip which are acceſſory. This is the meaning of theſe words of the law 16, §. 1, *quia totam obligationem ſenatus improbat.*

It appears to me that the ſame deciſion ſhould be made in regard to a ſecuritiſhip entered into for a feme covert who had contracted an obligation without being authoriſed. Indeed it ſhould be ſo decided *a fortiori*: for it was only *per exceptionem* that the law annulled the obligation of a woman who bound herſelf contrary to the Velleian ſenatus-conſultus; but it may be ſaid that, according to our cuſtomary law, the obligation of a woman who has contracted without being authoriſed, although it may be valid in *foro conſcientiæ*, is null, even *ipso jure*, in *foro legis*, ſince our cuſtoms declare her abſolutely incapable of contracting and binding herſelf. *A married woman* CANNOT BIND HERSELF, &c. Paris, *art.* 234; CAN IN NO MANNER CONTRACT; Orleans, *art.* 194, Domat, *tit. caut.* §. 1, *n.* 4, is of an opinion contrary to ours: and Baſnage cites a caſe in the Parliament of Burgundy reported by Bouvet, it which it was determined that a ſecuritiſhip entered into for a woman who had contracted without being authoriſed was valid: but I do not think that the deciſion of this caſe ought to be followed. The diſtinction upon which Baſnage wiſhes to ground this deciſion, whether t

principal obligation is null *ratione rei in obligationem deductæ*, or is ſo *ratione perſonæ*, does not appear to me to be ſolid. An obligation, in whatever manner it may be null, *ratione rei*, or *ratione perſonæ*, is not truly an obligation, and it is of the nature of contracts of ſecuritiſhip, that they cannot take place without a true principal obligation; *ſupra*, *n.* 365. A feme covert ought not to be compared to a minor: the obligation of a minor is not null; the relief which the law grants him againſt his obligation, ſuppoſes an obligation: there is one then to which the ſecurities may accede. But the obligation of a feme covert who contracts without being authoriſed, is abſolutely null; there is no obligation to which a ſecurity may accede.

But if one has bound himſelf jointly with a feme covert, who contracted without being authoriſed, not as the ſecurity of this woman, but as a principal debtor, the nullity of the obligation of the feme covert will not carry with it the nullity of his. For example; if a feme covert, without being authoriſed, and I have borrowed of you a certain ſum of money which was received by her, and we bound ourſelves *in ſolidum* to return it to you; the feme covert would not be bound to you, if ſhe waſted the ſum; but I would, not the leſs, be bound to repay it to you, being myſelf a principal debtor and having borrowed it from you: for, in order that I may be the borrower, it is not neceſſary that I ſhould have received the ſum myſelf; it ſuffices that you have really paid it to this woman with my concurrence

The obligations which are againſt morality, *contra bones mores*, being null, do not admit of ſecuritiſhip. For example, if a perſon, in charging me to commit a crime, has bound himſelf to indemniſy me for all the conſequences which might follow, and to give me a certain reward, one could not validly become a ſecurity for the performance of ſuch an obligation, which, being *contra bones mores*, is null and conſequently cannot be the object of a ſecuritiſhip. It is in this ſenſe that it is ſaid *malefactorum fidejussorem accipi non posse*: but one may validly become a ſecurity for a

perſon who has committed a tort, for the reparation of the injury he has done ; L. 70, §. *fin.* ff. *de fidejussor.*

396. One may become a ſecurity even for the obligation of a perſonal act which can be performed only by the principal debtor; L. 8, §. 1, ff. *de op. lib.*; for this obligation, by its inexecution, is converted into an obligation of damages, which the ſecurity may pay ; and this ſuffices for the ſecuritiſhip to be validly contracted.

397. The civil law did not permit a wife to receive from her huſband a ſecurity for the reſtitution of her portion ; this diſtruſt of him to whom ſhe had ſubmitted her perſon, did not appear to the Emperors to be becoming ; L. 1 & 2, *Cod. de fid. vel mand. dot.* Theſe laws are not obſerved with us.

398. One may become a ſecurity not only for a principal obligation, but even for a ſecuritiſhip : *Pro fidejussore fidejussorem accipi posse nequaquam dubium est* ; L. 8, §. 12.

399. Finally, a perſon may become a ſecurity not only for an obligation already contracted, but for one which is to be contracted, though it be not yet contracted ; *Adhiberi fidejussor tam futuræ quam præsenti obligationi potest* ; L. 6, §. *fin. d. tit.* ; ſo, however, that the obligation reſulting from this ſecuritiſhip, will commence only from the time the principal obligation ſhall be contracted : for it is of its eſſence that it cannot take place without a principal obligation. According to theſe principles I may validly become a ſecurity to you for the ſum of a thouſand crowns, which you propoſe to lend to Peter : but the obligation from this ſecuritiſhip, will not begin to have effect until the day when you ſhall actually make this loan to Peter ; while you have not yet made it, and the thing is entire, I may withdraw my aſſent, by notifying to you not to make the loan to Peter, and declaring that I do not intend any longer to be a ſecurity for him ; *Basnage, Traite des Hypoth. n.* 2, *ch.* 6.

§. III.

How securitiship is contracted.

400. In the civil law, ſecuritiſhip was contracted only

by ſtipulation; ſtipulation is not in uſe among us. Securitiſhip may be entered into by a ſimple agreement, either by a notarial inſtrument, or under a private ſignature, or even orally; except that if the object be above the value of one hundred livres, the proof, by witneſſes, of an oral agreement is not admitted.

401. Although ſecuritiſhip may be entered into by letter or even orally, care muſt be had however, not to take for a promiſe to become ſecurity, what one ſays or writes, unleſs there be a well marked intention to do ſo. Therefore if I wrote or ſaid to you that a man who aſked you to lend him money was ſolvent, this could not be taken for a ſecuritiſhip, for I might well have no other intention than to inform you what I believed to be the caſe, and not to bind myſelf. On this principle it was adjudged in a caſe reported by Papon X. 1, 12, that theſe words in a letter to the keeper of a boarding houſe, *A. B. intends to send his son to board with you. He is an honest man and will pay you well*, did not include any obligation. On the ſame principle, if I accompany a perſon to a woollen draper's, where he buys cloth, the draper cannot conclude that I am a ſecurity for him.

Although a perſon makes a partial payment for another, even for his ſon, it cannot hence be concluded that he meant to be ſecurity for him, for the remainder of the debt; L. 4. *Cod. ne uxor, pro marito, &c.*

If it were mentioned in an obligation that it was made in my preſence, and that I had ſubſcribed it, it could not be concluded that I became a ſecurity; I ought to be holden in ſuch caſe to have ſubſcribed it only as a witneſs. L. 6, *Cod. de Fidej.*

402. When the debtor is bound to give a ſecurity, either by his own agreement or by the law, the creditor may require that the ſecurity ſhould bind himſelf by a notarial inſtrument.

Judicial ſecurities bind themſelves in the office of the clerk of the court, by an inſtrument which he receives.

403. It is immaterial whether the ſecuritiſhip is entered into at the ſame time with the principal obligation, or at a different time, before or ſince.

It is not neceſſary that he for whom a ſecurity is given, ſhould conſent; L. 30, ff. *d. tit.*

Section V.

Of the extent of securitiship.

404. To judge of the extent of the obligation of a ſecurity, much attention is to be paid to the manner in which it is expreſſed.

When the ſecurity has expreſſed the ſum and cauſe for which he became a ſecurity, his obligation does not extend beyond the ſum and cauſe expreſſed. For example; if one had become a ſecurity for my leſſee for the payment of his rent, he will not be anſwerable for the other obligations of the leaſe, ſuch as might reſult from waſte, or from the advances that I might have made to the leſſee, &c.

If one had become a ſecurity for the principal ſum due by the debtor, he will not therefore be liable for the intereſt that may accrue. L. 68, §. 1, ff. *d. tit.*

On the contrary, when the words of the ſecuritiſhip are general and indeterminate, the ſecurity is preſumed to have bound himſelf for all the obligations of the principal debtor reſulting from the contract to which he acceded. He is preſumed to have become a ſecurity for him *in omnem causam.*

For example; if the contract of ſecuritiſhip, by which one bound himſelf to me for my leſſee, expreſſes in general terms that he becomes a ſecurity for the leaſe, he will not only be anſwerable for the rents, but generally for all the obligations of the leaſe; as for example, for waſte, to refund advances or reſtore the furniture or utenſils that may have been left for the uſe of the leſſee, *dotes prædiorum*; L. 52, §. 2, ff. *d. tit.*; for intereſt accruing on the rent in arrear, &c.

He who becomes a ſecurity in general terms, is bound

not only for the principal ſum due by the debtor, but alſo for all the intereſt that may be due. L. 2, §. 11 & 12, ff. *de adm. rer. ad civit. pertin.* L. 54, ff. *locat.*

He is liable not only for thoſe that are due *ex rei natura*, but even for thoſe which are occaſioned by the delay of the principal debtor: *Paulus respondit, si in omnem causam conductionis se obligavit, eum quoque exemplo coloni, tardius illatarum per moram coloni pensionum præstare debere usuras; d.* L. 54.

He ought alſo to be liable for the coſts of ſuit againſt the principal debtor; for theſe coſts are an acceſſory of the debt; but he ought to be liable only from the day the ſuit was notified to him; which has been eſtabliſhed to prevent a ſecurity from being ruined by coſts incurred without his knowledge, and which he could avoid by paying, if he had notice; therefore till the ſuit be notified to him, he ought to be chargeable only for the coſts of the original proceſs.

405. However extended or general the ſecuritiſhip may be, it reaches only the obligations that reſult from the contract for which the ſecurity bound himſelf, and not thoſe that would reſult from a foreign clauſe.

For example. A creditor in our Weſt-India Iſlands lent a ſum of money to a perſon who, for the ſafety of the creditor, has given him a negro in pledge, whom he knew to be a thief, without giving notice to the creditor. The negro robbed the creditor to whom he was given in pledge. The creditor may ſue the debtor who did not give him notice, for the damages, *contraria pignoratitia actione.* But the ſecuritiſhip will not extend to thoſe damages which ariſe from a cauſe foreign to the loan for which the debtor's ſecurity bound himſelf: *Ea actio fidejussorem onerare non poterit, cum non pro pignore, sed pro pecunia mutua fidem suam obliget;* L. 54, ff. *de fidejuss.*

For the ſame reaſon, he who became a ſecurity for an adminiſtrator of public monies, is bound only for the payment of public monies, and not for the fines which the adminiſtrator may have incurred by his mal-adminiſtration.

Such is the deciſion of the Emperor Severus: *Fidejussores magistratuum in pœnam vel mulctam non conveniri debere decrevit;* L. 68, ff. *d. tit.* And in general, however unlimited the ſecuritiſhip may be, it does not extend to the penalties to which the debtor may be condemned, *officio judicis, propter suam contumaciam;* for this is a cauſe foreign to the contract: *Non debet imputari fidejussoribus, quod ille reus propter suam pœnam præstitit;* L. 75, *d. tit.*

SECTION VI.

Of the manner in which securitiship is extinguished, and of the different pleas which the law grants to securities.

ARTICLE THE FIRST.

In what manner securitiship is extinguished.

405. The obligation that reſults from a ſecuritiſhip is extinguiſhed, I. in the different ways in which all obligations are extinguiſhed: we ſhall relate them *infra, part* 3.

II. It is of the nature of ſecuritiſhip, as it is of all acceſſory obligations, that the extinction of the principal obligation carries with it the extinction of the ſecuritiſhip, and the diſcharge of the ſecurities. *Supra, n.* 377, *& seq.*

III. The ſecurity is diſcharged, when the creditor has by his own act diſabled himſelf from ceding his actions againſt any of the principal debtors, to which the ſecurity has an intereſt to be ſubrogated; *infra, part* 3, *ch.* 1, *art.* 6, §. 4.

IV. When the creditor has voluntarily received from the debtor a piece of land in payment of a ſum of money due, is the ſecurity diſcharged, although, a long time after, the creditor be evicted from the land? The reaſon to doubt is, that in this caſe the payment is invalid, not having transferred to him to whom it is made the property of the thing; *infra, part* 3, *chap.* 1, *art.* 3, §. 3. Conſequently the principal obligation continues: whence it ſeems to follow that the obligation of the ſecurities muſt likewiſe remain. Baſſet IV. 22, 5, reports a caſe in which it was thus determined. Notwithſtanding theſe reaſons and although it cannot be

denied that the payment, in this caſe, is not valid and that the principal obligation remains, it has been adjudged in ſeveral caſes cited by Baſnage, *Trait. Hypoth. p. 3, ch. fin.*, that the creditor in ſuch caſes cannot be allowed to proceed againſt the ſecurities, if, in the mean while, the principal debtor becomes inſolvent. The deciſion in theſe caſes is grounded on this maxim of equity, *Nemo ex alterius facto prægravari debet.* The ſecurity ought not to ſuffer from the arrangement that has taken place between the creditor and principal debtor. Therefore if, in this caſe, the creditor might proceed againſt the ſecurity, the ſecurity would ſuffer from the arrangement by which the creditor received the land in payment; the creditor having, by this arrangement, deprived the ſecurity of the opportunity of paying the creditor, and recovering from the debtor, whilſt he remained ſolvent, the ſum to which he had been bound for him.

Quid, if the creditor had ſimply granted to the debtor a delay for the payment, and in the mean while the debtor became inſolvent, could the ſecurity refuſe to pay? *Vinnius, Q. illustr.* 11, 42, holds the negative. This caſe is widely different from the preceding. In the preceding caſe the delivery of the land given in payment having, till the eviction, made the debt appear to be diſcharged, ſuch an arrangement deprived the ſecurity of every way to provide for his own ſafety, even if he had diſcovered that the affairs of the debtor began to be deranged; for he could not demand from this debtor to be freed from his ſecuritiſhip, which ſeemed to be diſcharged as well as the principal debt: whereas the ſimple delay, not making the debt to appear diſcharged, deprives the ſecurity of none of the means of providing for his ſafety, and of proceeding againſt the principal debtor, if he perceives his affairs are falling into diſorder, *si bona dilapidare cæperit.* L. 10, *Cod. mand.* The ſecurity cannot then pretend that this delay granted to the principal debtor prejudices him, ſince he himſelf derives an advantage from it.

The obligation of the contract of ſecuritiſhip was alſo extinguiſhed, according to the principles of the civil law,

by confuſion, of which we have ſpoken, *ſupra*, n. 383, but this does not apply with us.

The bringing of a ſuit by the creditor againſt the principal debtor, does not diſcharge the ſecurity, who always remains bound till payment. L. 28, *Cod. de Fidej.* Therefore the creditor may abandon his ſuit againſt the principal debtor, to proſecute the ſecurity. But ordinarily the ſecurity may oppoſe to him the plea of diſcuſſion, of which we are going to treat in the next article.

Article II.

Of the plea of discussion.

§. I.

The origin of this right.

407. According to the principles of law which were in uſe before the novel 4, of Juſtinian, the creditor could not demand from the ſecurities the payment of what was due him, without reſorting firſt to the principal debtor: *Jure nostro*, ſays Antonine Caracalla, in L. 5, *Cod. de Fidej.*, *est potestas creditori, relicto reo, eligendi fidejussores, nisi inter contrahentes aliud placitum doceatur.* The Emperors Diocletian and Maximilian decide the ſame in the law 19, *Cod. d. tit.* Juſtinian, *de Nov. cap.* 1, granted to ſecurities a plea of *discussion* or *plea of order*, which is to ſay, a plea by which they may ſend the creditor, who demands from them the payment of the debt, to the previous diſcuſſion of the principal debtor. This law of the novel is followed by us, but not with regard to all kinds of ſecurities, nor in all caſes.

§. II.

What securities may plead the plea of discussion.

408. Judicial ſecurities may not avail themſelves of this plea. *Louet, letter F*, 23.

Securities for the king's rents are not at the preſent day allowed to avail themſelves of this plea, though the Ordinance of Louis XII, 1513, had granted it to them. This alteration in our juriſprudence was introduced in the time of M. Lebret, who gives this reaſon for it, that theſe ſecu-

sides are preferred to be heard as parties of the principal debtor. *Le Brun, Pratique*, [illegible].

Lastly, some lawyers who have thought the creditor renounced this plea are not willing to admit that benefit of it: *Unicuique renunciare licet pro se introductum beneficium.*

Is the surety presumed to have renounced this plea, when it is expressed in the contract of securityship, that he binds himself as principal debtor? The authors are divided on this question. Some of old have determined in the Parliament of Paris are cited for that which has been holden that this is not sufficient, and that a renunciation must be express. Basnage, [illegible] says that in the Parliament of [illegible] it was held that these words are sufficient to [illegible] division of the plea of discussion, and that it was determined that they were inserted [illegible] they would mean nothing. This is [illegible] the rule for the interpretation of agreements [illegible].

The renunciation of the benefit of discussion and division, is not to be confined to these words, which might be at the end of a contract of securityship, *promising, engaging* and *renouncing* [illegible]. The word *renouncing* is vague and indefinite [illegible] that the renounce be expressed, and [illegible] in a clear style, signifying [illegible] same. This decision is not [illegible] case, but extended this clause [illegible] a renunciation of the benefit of discussion. Bornonius, Tract. Cler. quæst. [illegible] that it has been so decided. The reader [illegible] by what he adds in the [illegible] of the parties; *infra, part. 2, chap. 1, sect. 2, art. 1.*

ART. III.

In what case the creditor is not bound to discussion, and when the principal debtor is to be sued.

403. The creditor is not bound to a discussion in all cases, and it may in this respect be established as a princi-

ple, that the creditor is not bound to a diſcuſſion that would be too difficult.

It is for this reaſon that the novel, in granting to the ſecurity the benefit of diſcuſſion, excepts the caſe in which the principal debtor ſhould be abſent, unleſs the ſecurity offered to produce him, in a ſhort time to be fixed by the judge.

This exception which the novel puts to the plea of diſcuſſion, is not admitted with us. The reaſons on which it is grounded are drawn from the difficulty there was in the proceedings among the Romans againſt an abſent perſon. They do not exiſt here; the ſummons and notice at the place of abode being as effectual in our practice, as if perſonally given, renders the excluſion of the property of the principal debtor as eaſy when he is abſent as when preſent.

410. The creditor is not bound to diſcuſs the property of the principal debtor before he proceeds againſt the ſecurity, except when the ſecurity requires it and pleads his privilege; therefore though the creditor has not diſcuſſed the property of the principal debtor, his demand and his ſuit againſt the ſecurity are proper until the ſecurity avails himſelf of this plea.

It is in conſequence of this principle that it has been determined in a caſe of the firſt of September 1705, cited by Bretonnier on Henrys, that the judge cannot *ex officio* order the diſcuſſion.

The plea of diſcuſſion is ranked among dilatory pleas; ſince it tends only to delay the ſuit of the creditor againſt the ſecurity, till after the time of the diſcuſſion, and not to bar it. Therefore according to the rule common to all dilatory pleas, L. 12, *Cod. de except.*, it ought to be pleaded before a plea in chief. If the ſecurity were to plead in chief, without pleading the diſcuſſion, he would not be allowed to avail himſelf of it; being preſumed, by pleading in chief, to have waved his right; *Gui Pape, and the authors by him cited*, q. 50. He might however be permitted to avail

himself of it; if the property of which he demands the discussion, had only come to the principal debtor since the plea in chief, *puta*, if an estate had been left to him. For the rule that dilatory pleas must be pleaded before pleas in chief; can only apply when the plea existed at the time, and not when it has arisen since: as the defendant cannot be presumed by his plea in chief to have waved a right, that has accrued since. *Guthieres, and the authors cited by him, Tract. de Contr. jurat.* xxij. 18.

§. IV.

What property the creditor is bound to discuss.

411. When the discussion is pleaded, the creditor, if he has not a title on which execution may be issued against the principal debtor, ought to sue him and obtain a judgment against him. In consequence of this judgment, or, without suit, in consequence of his title of execution, he ought to proceed by summons against the principal debtor, and to seize and attach the moveable property which may be in his house.

If there can be found no property on which the execution may be levied, the officer ought so to certify, and his return will be equivalent to the discussion of the personal property.

As to any other real or personal property, which the principal debtor may have, the creditor, not being bound to know it, is not obliged to discuss it unless it be indicated by the security. This indication ought to be made at one time, and ought to contain all the property of the debtor which it is intended that the creditor should discuss. One would not be allowed, after the discussion of the property that has been indicated, to indicate other property. *Arretes de Lamoignon, tit. des discussions, art.* 9; a case of the 20th January 1701, cited by Bretonnier on Henrys, *vol.* 4, 34.

412. As the discussion ought not to be too difficult, the creditor cannot be bound to discuss property of the debtor which is out of the kingdom. M. de Lamoignon thought they ought not to be compelled to discuss property in the

jurisdiction of a other parliament; *Arretes de Lamoignon, ibid.*

Nor is the creditor bound to discuss the property of the debtor which is in dispute; for he is not to be compelled to maintain suits, nor to wait the event of them in order to be paid: this is a further consequence of the same principle, that the discussion ought not to be too long or too difficult.

For the same reason, he is not bound to discuss the property hypothecated by the principal debtor, when the principal debtor has aliened it, and it has passed into the possession of third persons; these persons in possession have, on the contrary, the right to send back the creditors, who should claim this property, to discuss the other property of the principal debtor or that of the securities; *d. Nov. cap.* 2.

It is not so with regard to those who have succeeded to the whole estate of the principal debtor, such as universal donees or legatees, and even the treasury, when it has succeeded to the principal debtor by escheat or confiscation. These universal successors are *loco heredis*: they represent the principal debtor, taking the place of his heirs; they ought therefore to be liable to the discussion, in the same manner as the principal debtor would have been, to the amount of the debts of the principal debtor, for which they are liable.

When several principal debtors have contracted an obligation *in solidum*, and one of them has given a third person for a security, it is asked whether this security can oblige the creditor to discuss, not only the property of the debtor for whom he is a security, but likewise that of all the other principal debtors? I think he can. It suffices, to be convinced of this, to examine the reason on which the plea of discussion is founded. It is not because it is presumed that the security intended to bind himself only in case of the failure and insolvency of him for whom he became a security: this intention ought to be expressed; when it is not expressed it is not to be presumed, and the obligation is absolute. If this presumption applied in ordinary securiti-

ſhip, the right which the ſecurity would have to ſend the creditor to a diſcuſſion againſt the principal debtor, would be a right which he would have in ſtrictneſs of law; the creditor would not have an action againſt the ſecurity before the inſolvency of the principal debtor had been proved by the diſcuſſion. All agree that the plea of diſcuſſion which the law grants to the ſecurity, is granted merely through favor, and that the action of the creditor againſt the ſecurity is by ſtrictneſs of law and is well grounded, although the principal debtor is ſolvent and his property has not been diſcuſſed; it is neceſſary then to ſeek another reaſon for this plea of diſcuſſion, and there is no other than this, which is that it is equitable a debt ſhould be paid, as far as it may be, by thoſe who are the true debtors and who have been benefited by the contract, rather than by thoſe who are debtors only for another; that it is always a hardſhip to be obliged to pay for another: therefore equity requires that the creditor, when it muſt be of little or no difference to him, ſhould ſave the ſecurity from this hardſhip, and ſhould cauſe himſelf to be paid rather by the true debtors than by the ſecurity. This is the reaſon which Quintilian, *declam.* 273, gives for the benefit of diſcuſſion. After having ſaid that it is a hardſhip for a ſecurity to be obliged to pay for another, *miserabile est*, he concludes that a creditor cannot with a good grace bring this hardſhip upon a ſecurity, while he may cauſe himſelf to be paid by the true debtor: *Non aliter salvo pudore, ad sponsorem venit creditor, quam si recipere a debitore non possit.* It is evident that theſe reaſons operate to oblige the creditor to diſcuſs the property, not only of the debtor *in solidum* for whom he became a ſecurity, but alſo that of all the other principal debtors: therefore the ſecurity is well grounded in demanding the diſcuſſion of the property, not only of the debtor for whom he became a ſecurity, but alſo of the other principal debtors. It may even be ſaid that he who has become a ſecurity for one of ſeveral debtors *in solidum*, is alſo in a manner a ſecurity for the others; for the obligation of all theſe debtors being the ſame obligation, in acceding to the obligation of the one for

whom he became a ſecurity, he has acceded to that of them all.

§. V.

At whose cost the discussion is to be made.

413. The diſcuſſion is to be made at the coſt and peril of the ſecurity who demanded to have it made: and as the diſcuſſion of real property cannot be made without great expence, the creditor may require that the ſecurity ſhould defray it. This is a general rule in all caſes in which the plea of diſcuſſion is pleaded. *Journal des audiences, Vol.* 1, l. 5, *ch.* 25; and it is a conſequence of our principle.

§. VI.

Is the creditor who has failed to make the discussion, liable for the insolvency of the debtor.

414. May the creditor to whom the plea of diſcuſſion is oppoſed and who has ſuffered ſeveral years to elapſe without making a diſcuſſion, during which time the debtor has become inſolvent, proceed, on the diſcuſſion of his property ſince he became inſolvent, againſt the ſecurity? I think he may; and that the ſecurity cannot plead that he did not make in due time the diſcuſſion of the property of the principal debtor which was required of him. The reaſon is that the right which the ſecurities have to the plea of diſcuſſion granted them by the novel is limited to the ſtopping of the ſuit of the creditor againſt them, 'till he has proſecuted the principal debtor, and has made a diſcuſſion of his property. The advantage this novel gives them is confined, as has been ſaid, to this, that the creditor may not firſt proceed againſt the ſecurity; *creditor non primum ad fidejussorem aut sponsorem accedat.* It ſuffices then that the creditor ſhould not proſecute his ſuit againſt the ſecurities before he has ſued the principal debtor and made a diſcuſſion of his property. The creditor may make this diſcuſſion whenever he pleaſes, and nothing binds him to do it at the pleaſure of the ſecurity. The law having fixed the time within which the creditor may bring his ſuit, the ſecurity cannot ſue

ſhorter time than is granted by the law: *Nemo invitus agere compellitur; toto tit. Cod. Ut nemo invitus, &c. Creditor ad petitionem debiti urgeri minime potest;* L. 20, *Cod. de pign.* Therefore, if the principal debtor, to the diſcuſſion of whoſe property the creditor has been ſent back, is ſince become inſolvent, the ſecurity cannot complain of the creditor who did not proſecute him whilſt he was ſolvent; the creditor was not bound to do ſo, and the ſecurity, if he had been apprehenſive of the inſolvency which has happened, might have guarded againſt it by proſecuting, himſelf, the principal debtor, as he had a right to do, as ſoon as he himſelf was ſued; *infra, n.* 440, Henrys, *vol.* 2, L. 4, *art.* 34, is of this opinion. He ſupports it by a deciſion in a ſimilar caſe and informs us that in his time ſuch was the received opinion in the Parliament of Paris. The cuſtom of Brittany, *art.* 192, has a contrary diſpoſition. I imagine it ought to be confined to that province. D'Argentré on this article, ſays that this diſpoſition derived from the ancient cuſtom, was preſerved, at the reformation, againſt his opinion.

We have conſidered this queſtion with regard to ordinary ſecurities: but if the ſecurity had bound himſelf only to pay what the creditor could not obtain from the principal debtor, *in id quod servari non poterit*, the creditor who ſhould have had it in his power for a conſiderable time to procure the payment from the principal debtor, would not be eaſily admitted to bring his action againſt the ſecurity, after the debtor, at the end of a conſiderable time, ſhould have become inſolvent; L. 41, ff. *d. tit.*; becauſe this ſecurity who bound himſelf only to pay what the creditor *could not obtain*, would plead that he might eaſily have obtained from the principal debtor what was due him, and therefore, that he, the ſecurity, owes nothing. L. 41, ff. *tit.*

Article III.

Of the plea of division.

§. I.

The origin of this right.

415. When several persons become the securities of a principal debtor for the same debt, they are holden to have bound themselves each for the whole debt: *Si plures sint fidejussores, quotquot erunt numero, singuli in solidum tenentur. Instit. tit. de fidej. §. 4.*

In this, several securities differ from several principal debtors who are not holden to bind themselves otherwise than each for his part of what they jointly promise, if it be not expressed that they bind themselves *in solidum*. The reason of this distinction is that it is of the nature of the contract of securitiship to bind to all that which the principal debtor owes: and consequently each of those who are securities for him are presumed to contract such an engagement, unless he expressly declares that he binds himself only for a part; this is the reason given by Vinnius, *select. quæst. lib. 2, cap. 40.*

The Emperor Adrian modified this liability for the whole by the plea of division which he granted to securities: the security from whom the creditor demands the whole debt, by this plea obliges the creditor to divide the debt between him and his co-securities, when they are solvent, and is consequently allowed to pay his part to the creditor; saving to the creditor his right for the surplus against the others. This modification has been adopted in our jurisprudence.

§. II.

Of those who may, or may not, avail themselves of the plea of division.

416. There are some securities who cannot avail themselves of this plea; such are securities for public monies. See *Lebret, plaid. 42, in fin.*

Judicial securities also are excluded from the benefit of this plea: such is the opinion of Basnage. The securities who by their contract of securitiship have renounced it, are also excluded.

When the contract of securitiship expresses that the securities have bound themselves *in solidum and as principal debtors*, does this clause include an implied renunciation of the plea of division? Those who think that this clause does not include a renunciation of the plea of discussion, ought also to think that it does not include a renunciation of the plea of division; but the reasons that induced us to think it includes a renunciation of the plea of discussion, and which we have stated *supra*, *n.* 408, induce us also to think that it does include a renunciation of the plea of division.

Finally, the laws refuse the plea of division to the securities who have at first, *mala fide*, denied the securitiship. *Inficiantibus auxilium divisionis non est indulgendum*; L. 10, §. 1, ff. *de fidej.*

417. Not only securities themselves but also their heirs may have the benefit of this plea.

The security of a security may also avail himself of the same pleas that might have been pleaded by the security whose security he himself is, and demand the division of the debt between him and the co-securities of the security for whom he is bound.

§. III.

Who are those between whom the debt ought to be divided.

418. The security may demand the division of the action between himself and the other securities who are also principal securities. He could not demand that it should be divided between himself and his own security, for he is himself a principal debtor with regard to his security; L. 57, §. 4, ff. *de fidej.*

419. It is necessary also that those with whom the security demands the division of the action be securities of the same debtor. If two debtors *in solidum*, of the same debt, had each given a security, the security of one of those debtors

ought not to require that the action should be divided between him and the security of the other debtor *in solidum*; for although they are securities for the same debt, yet as they are not securities of the same debtor, they are not properly co-securities. This is the decision of the law 43, § 5, ff. *ad tit.*

420. Finally, it is necessary that the co-securities, with whom the security requires the division of the action, be solvent; and they are presumed to be solvent, when not being in themselves, they are secured by their own securities: it is thus decided by the law 27, § 2, *Si quæratur an sol. vendi sit principalis filiusfam. et tutor ejus sequens fidejussoris ejus aggregandus sit.*

But if my co-security was solvent, in the beginning of the suit, and the action was therefore divided between him and me, although afterwards, and since the suit, he became insolvent, the creditor will not be allowed to resort to me for his part: this is the decision of Papinian, L. 51, § 4, & L. 59, § 1.

In this, the plea of division differs from the plea of discussion. The reason of this distinction is drawn from the different nature of these pleas. The plea of discussion is only a dilatory plea. It only delays the action of the creditor against the security, 'till the creditor shall have discussed the property of the principal debtor: whereas the plea of division is a peremptory plea or a plea in bar; when it is admitted, it entirely destroys the action of the security who pleads it, for the part of his co-securities with whom the division is allowed. This is the reason why the creditor can no longer resort to him, even when the co-securities should afterwards become insolvent.

Further; although indeed, when the creditor brings his action, my co-security was already insolvent, if the creditor has willingly divided his action, by demanding from each only his part, he will not be allowed afterwards to demand from me the part of my insolvent co-security. This is the decision of Gordian, in the law 6, *Cod. d. tit.*

421. Provided my co-security be solvent, although the time annexed to the obligation is not arrived, or the condition under which he bound himself is not yet performed, yet I may demand the division of the action provisionally between him and me: saving to the creditor his recourse against me, for the part of this security, if, when the time is arrived or the condition is performed, he was not solvent. L. 27, ff. *de fid.*; and *a fortiori*, if the condition under which he bound himself is not performed.

422. As the action of the creditor is to be divided only when the securities are all solvent, if there is a contest between the creditor and the security, upon the fact of the solvency of the co-securities, the security is allowed, on tendering his part, to require that, before any decision take place as to the surplus, the creditor be bound to discuss the property of the co-securities; L. 10, ff. *d. tit.* But this is to be done at the risk of the security.

423. I cannot avail myself of the plea of division, if my co-security resides out of the kingdom; for this plea is a favor which the law grants only when the creditor does not, by the allowance of it, suffer too great an inconvenience. 10 *Papon*, 4, 25.

§. IV.

Whether the securitiship may be divided with a security who did not validly contract, or with a minor security.

424. When I have bound myself as a security for another, together with a person who was incapable of contracting such an obligation, as were women at Rome, I cannot avoid paying the whole of the debt to the creditor, in the same manner as if I were a sole security. The person who was incapable ought not to be regarded. No distinction is to be made in such case, whether I have entered into the securitiship before the person who was incapable, or whether I entered into it at the time or since.

It is otherwise, according to the civil law, when I have bound myself with a minor, who afterwards procures himself to be relieved from his obligation. I am liable for the

whole debt only in caſe I bound myſelf at firſt as a ſecurity, without depending on the minor, who afterwards became a ſecurity for the ſame perſon; but if we became ſecurity together, the relief which he may obtain from his obligation, ought not, according to the civil law, to charge me alone with the whole debt, which I expected he would pay jointly with me. L. 48, *pp.* & §. 1, ff. *de fidej.*

Papinian adduces this reaſon for the difference between a woman and a minor. He who has become a ſecurity jointly with a woman, ought not to have depended on her dividing the obligation, ſince he ought to have known that ſhe was incapable of it, *cum ignorare non debuerit mulierem frustra intercedere.* But it is not ſo with regard to him who became a ſecurity with a minor; *propter*, ſays Papinian, *incertum ætatis & restitutionis*, becauſe he might be ignorant that he was a minor, or hope that he would not avoid his obligation. It is the creditor, rather than he, who ought to have inquired into this, when he received him for a ſecurity; and it is the creditor, rather than he, who ought to ſuffer from the relief which the minor has procured againſt his obligation: *d. L.* 48, *pp.* & *L.* 1.

Whatever reſpect I may have for the deciſions of Papinian, this one appears to me very queſtionable. The ſeveral ſecurities being, as we have ſaid, debtors of the whole debt, the diviſion of it, which is granted by the conſtitution of Adrian when they are all ſolvent, is only a favor which ought not to prejudice the creditor. This reaſon which forbids the diviſion of the debt with my co-ſecurity when he has become inſolvent, ought to prevent its being allowed with my co-ſecurity who has procured himſelf to be relieved againſt his ſecuritiſhip. There is no greater reaſon to grant it in one caſe than in the other. If I could have foreſeen the inſolvency, I could with more facility have foreſeen that he might obtain the relief. It cannot be ſaid that the creditor was willing to take the riſk on himſelf in accepting the ſecuritiſhip of a minor; for as he has not been ſatisfied with the ſecuritiſhip of the minor and has required that

another security should be added, it is rather a proof that he thought to seek his safety against the relief which the minor might obtain, and that he was not willing to take that risk on himself.

These reasons appear to me sufficient to decide, without distinction, against the authority of the civil law, that the relief obtained by my co-security on account of his minority, ought, like his insolvency, to charge me with the whole debt.

Further; if before the minor security seeks relief against his securitiship, I was sued by the creditor and availed myself of the plea of division, I think it would be equitable that he should not be compelled to divide his action between the minor security and me, unless with the reservation of his recourse against me in case the minor procured himself to be relieved from his securitiship.

But if the creditor had consented to the division of his action without reservation, there is room to think that he took on himself the risk of the minor's procuring relief, and that he would not have any recourse against me.

§. V.

When the plea of division is to be pleaded.

498. It is asked whether the plea of division can be pleaded only before a plea in chief? Several ancient authors as Pierre de Belleperche, Cynus, and others, were of this opinion: but the contrary opinion, which is adopted by Vinnius, *sel. quæst.* 11, 40, is the most just. It is grounded on the formal text of the law 10, §. 1; *Cod. h. tit. Ut. dividatur actio inter eos qui solvendo sunt, ante condemnationem ex ordine solet postulari.* It suffices, according to the words of this law, to demand the division of the action before judgment, and consequently it may be demanded after a plea in chief. Indeed this is rather a plea in bar, than a dilatory plea; since it tends to destroy entirely the action of the creditor against him who pleads it, for the parts of his co-securities. The text of the Institutes, *tit. de fidej.* §. 4, on which the other opinion is grounded proves nothing. It says indeed, that all the co-securities ought to be solvent,

at the beginning of the ſuit, in order that there may be room for this diviſion, but it does not ſay that it cannot be demanded after.

The law 10, §. 1, ff. *de fid.*, in which it is ſaid that the ſecurity who has denied his ſecuritiſhip, is not admitted to demand a diviſion, is not contrary to our principle. For it is this denial *mala fide*, that renders him unworthy of this favor and prevents him from availing himſelf of this plea and not his pleading in chief. The plea in chief that has intervened between the creditor and the ſecurity, does not ſuppoſe that the ſecurity has denied his ſecuritiſhip. It may have intervened on other grounds, *puta*, that the debt is paid or that there is ſome other cauſe that prevents the creditor's action. Some authors have fallen into the oppoſite extreme, deciding that the diviſion may be demanded even after judgment, like the plea *cedendarum actionum*, and the pleas *SC. Macedoniani & SC. Velleiani.* This opinion is contradicted by the law 10, §. 1, *Cod. de fidej.*, where it is ſaid that the ſecurities may require the diviſion before judgment, *ante condemnationem*, therefore they cannot afterwards. With regard to the examples of pleas that may be offered after judgment, the anſwer is, that there is a great difference between the plea of diviſion and the plea *cedendarum actionum.* The latter does not attack the judgment nor the right acquired to the creditor by the judgment; and when the ſecurity againſt whom he has obtained a judgment, has ſatisfied it, he has no intereſt in refuſing to him the ceſſion of his actions; whereas the plea of diviſion if offered after the judgment obtained by the creditor, would attack this judgment and the right acquired by it to the creditor, ſince it reſtricts, to a part, the right which the creditor has acquired by the judgment to exact the whole from the ſecurity againſt whom he has obtained the judgment. As to what is decided in regard to the pleas *SC. Macedoniani & SC. Velleiani*, it is a particular right grounded on the favor afforded to theſe pleas and on a kind of public intereſt, *ad coercendos fœneratores & ad subveniendum sexui muliebri.* This particular right cannot be made a precedent, nor be extended to the plea of diviſion or to peremptory pleas.

When the judgment in favor of the creditor is ſuſpended by an appeal, it may be ſaid that there is no judgment, 'till there be a final judgment in the court of appeals; hence it follows that the ſecurity may be admitted in the appeal to plead his plea of diviſion. This is the opinion of the authors cited by Bruneman, *ad* L. 10, *Cod. de fidej.* It is alſo that of *Vinnius.*

§. VI.

Of the effect of the plea of diviſion.

426. The effect of the plea of diviſion is to obtain by the order of the judge the diviſion of the debt between ſecurities who are ſolvent, and by this method to reſtrict the action to the part of the ſecurity who pleads the diviſion.

Before the diviſion of the debt is ordered by the judge on the plea of diviſion, or before it is voluntarily made by the creditor by his ſuing each of the ſecurities for his part, L. 16, *Cod. de fidej.*, each of the ſecurities is a debtor of the whole debt. Therefore if either has paid the whole, he cannot have againſt the creditor any claim for the parts of his co-ſecurities. L. 49, §. 1, ff. *de fidej.*: for he really owed the whole of what he has paid. In not availing himſelf of the plea of diviſion which he might have done, *plenius fidem exſolvit.* But after the diviſion of the debt has been ordered, the debt is ſo far divided that even if one of the ſecurities between whom the debt has been divided, ſhould become inſolvent, the creditor would have no recourſe againſt the others for the part of the inſolvent ſecurity. L. 51, §. 4, ff. *de fidej.*

There remains a queſtion. If the ſecurity, who demands the diviſion of the action of the creditor between himſelf and his co-ſecurities, has paid part of the debt, ought he to pay the half of what remains due, without deducting what he has paid? Papinian decided it thus, *eam enim quantitatem inter eos convenit dividi, quam litis tempore debent.* This deciſion, though conformable to the ſtrictneſs of the the principle, has not been followed; it has been found

more equitable to allow the ſecurity to deduct from the part of the debt for which he is liable, what he has already paid, to compel him to pay only the ſurplus of his part of the whole debt, and to charge his co-ſecurity with the whole of the reſt: *Sed humanius est*, ſays the annotator, *si & alter ſolvendo ſit, per exceptionem ei qui ſolvit ſuccurri; d.* L. 51, §. 1.

Article IV.

Of the ceſſion of actions, or ſubrogation, which the creditor is bound to grant to the ſecurity who pays.

427. A third advantage which the law grants to the ſecurity, is that when he pays, he may require the creditor to ſubrogate him to all his rights and hypothecations, as well againſt the principal debtor for whom he was a ſecurity as againſt all other perſons who are liable for the debt. This is the reſult of the law 17, ff. *de fid.*; L. 21, *Cod. d. tit.*; and a number of other texts. See, on this ceſſion of actions, and on the plea which the ſecurity has, who has diſabled himſelf, by his own act, to cede them, *infra*, *Part* 3, *ch.* 1, *Art.* 6, §. 2.

Section VII.

Of the right which the ſecurity has againſt the principal debtor and againſt his debtors.

428. The ſecurity, after he has paid, has recourſe againſt the principal debtor. We ſhall treat of this recourſe in the firſt ſucceeding article. There are indeed ſome caſes in which the ſecurity has an action againſt the principal debtor even before he has paid; we ſhall treat of theſe in the ſecond article. We ſhall treat in the third of the particular queſtion, whether the ſecurity for an annuity may, after a certain time, oblige the debtor to redeem it. We ſhall treat in the fourth of the right which the ſecurity has againſt his co-ſecurities.

ARTICLE THE FIRST.

Of the recourse of the security, after he has paid, against the principal debtor.

§ I.

What are the actions which the security, after he has paid, has against the principal debtor.

429. After the ſecurity has paid, if he has cauſed himſelf to be ſubrogated to the rights and actions of the creditor, he may proſecute them againſt the debtor, as the creditor himſelf could have done. If he has neglected to acquire this ſubrogation, he may notwithſtanding, have in his own right an action againſt the principal debtor, in order to be reimburſed for what he has paid for him.

This action is the action *mandati contraria*, if it was with the knowledge and conſent of the principal debtor that he became a ſecurity for him: for this conſent of the principal debtor includes a tacit contract of mandate, according to this rule of law: *Semper qui non prohibet pro ſe intervenire, mandare creditur*; L. 60. ff. *de R. J.* If the ſecurity bound himſelf for the principal debtor without his knowledge, he cannot have againſt him the action *mandati*; but he has againſt him the action *contraria negotiorum geſtorum*, which has the ſame effect.

§. II.

What payment gives rise to these actions.

430. It is not material whether the ſecurity has paid in conſequence of a judgment, or voluntarily and without judgment; for in either caſe, *utiliter debitoris negotium geſſit.* He has procured to the debtor the diſcharge of his debt, and conſequently he ought to be reimburſed for what he has paid to procure it.

It is not material whether the payment was an actual payment, or a ſet-off or a novation. In all theſe caſes the ſecurity has the right to demand that the principal debtor reimburſe him, either for the ſum which he has paid, or that which he has admitted in the ſet-off, or that which he

has bound himſelf to pay in order to extinguiſh the obligation of the principal debtor.

431. If the creditor, from favor to the ſecurity, had releaſed the debt by a mere gift, the ſecurity cannot demand any thing from the principal debtor who has profited by this releaſe, becauſe the ſecurity has paid nothing. If the releaſe was made as the recompence of ſervices which the ſecurity had rendered to the creditor, the ſecurity might demand to be reimburſed for this ſum by the principal debtor; for in this caſe the ſecurity has paid the recompence he was entitled to for his ſervices, which he admitted in the ſet-off for the debt of this principal debtor, that he acceded to as a ſecurity. This is the deciſion of the law 12, ff. *mandat.*: and it is conformable to the principle, *sciendum est non plus fidejussorem consequi debere mandati judicio, quam quod solverit.* L. 26, §. 4, ff. *d. tit.*

§. III.

The three conditions under which the payment made by the security may give rise to the action against the principal debtor.

432. In order that the payment made by the ſecurity may give riſe to theſe actions, it is neceſſary, I. that the ſecurity ſhould not have neglected by his fault any plea which he might have oppoſed to the creditor: II. that the payment ſhould have been valid and ſhould have diſcharged the principal debtor. III. that the principal debtor ſhould not have paid a ſecond time by the fault of the ſecurity.

First condition.

433. In order that the ſecurity who has paid may have his recourſe againſt the principal debtor, it is neceſſary that he ſhould not have omitted by his own fault to plead the proper pleas to the ſuit of the creditor. For example. If one was my ſecurity for the price of a piece of land which I bought, and knowing that I was evicted from it, he nevertheleſs pays the price to the ſeller to whom he bound himſelf as a ſecurity for me, he will not have any recourſe againſt me; becauſe he might have ſaved himſelf from

paying by oppoſing to the ſeller the plea reſulting from the eviction which I ſuffered. If the ſecurity was ignorant of the eviction and conſequently of the plea which reſulted from it to the action brought againſt him by the ſeller, for the price, I ſhall be obliged to reſtore to him what he has paid, ſaving my recourſe againſt the ſeller: for he was not in fault in not oppoſing a plea of which he had not any knowledge, and it is I, on the contrary, who was in fault for not having informed him of it. The law 29, ff. *mand.*, eſtabliſhes theſe principles in a ſimilar caſe. However, it is only an ignorance of the fact which can in this caſe defend the ſecurity; it would be otherwiſe in regard to an ignorance of law. *Finge.* I purchaſed, under your ſecuritiſhip, a houſe which had been entirely deſtroyed before the contract, being, at the time, ignorant of its deſtruction; although you were afterwards informed of it, you have paid the price which, through an ignorance of law, you believed to be due: you ought not to have any recourſe againſt me; *d.* L. 29, §. 1.

434. If the ſecurity had a plea to oppoſe to the creditor's ſuit, but ſuch as he could not honorably plead, in this caſe the ſecurity is not indeed bound to plead it; but he ought not to deprive the principal debtor from pleading it. Therefore he ought to ſuffer himſelf to be ſued, and bring in the debtor as a party, to plead it if he ſee fit. On failure to do this, the ſecurity will have no recourſe againſt the principal debtor, for what he has paid. This is the reſult of the law 41, ff. *mand.* & L. 10, §. 12, *d. tit.*

We may addnce as an example of theſe pleas which cannot be honorably pleaded, that which may be pleaded to the creditor of an annuity who has ſuffered more than five year's arrearages to accumulate.

435. The rule which we have given that the ſecurity, in order to have his recourſe againſt the principal debtor, ought not to have omitted through his own fault to plead any of the pleas he may have had, admits of an exception when the pleas were perſonal to him and could not have

been pleaded by the principal debtor. For example. If the ſecurity who had bound himſelf for me till a certain time pays for me after the time has elapſed; although he may have avoided paying, yet he may have his recompence againſt me, becauſe he has paid for me that which I could not have avoided paying. This is the deciſion of the law 29, §. 6, ff. *mand. Quamquam enim jam liberatus solverit, fidem implevit & debitorem liberavit.* It ſuffices that he has procured me the diſcharge at his expence, in order that I may be bound to indemniſy him; otherwiſe I ſhould enrich myſelf at his expence, which equity does not allow: *Neminem æquum est cum alterius detrimento locupletari.*

Second condition.

436. That the ſecurity may have his recourſe againſt the principal debtor, it is neceſſary that the payment he has made ſhould be valid. Therefore if he who owed me a horſe indeterminately, gave me a ſecurity and this ſecurity ſhould afterwards give me one that happened not to belong to him, the ſecurity will have no recourſe againſt the principal debtor, becauſe the payment he made is not valid and has not procured to the debtor his diſcharge.

437. This rule admits of an exception in the caſe in which the ſecurity when ſued by the creditor ſhould pay, being ignorant that the principal debtor had already paid. For though this payment made by the ſecurity, being the payment of a ſum which had ceaſed to be due, is not a valid payment, yet the ſecurity will, not the leſs, have his recourſe, *actione mandati contraria*, againſt the principal debtor, to be reimburſed for the ſum he has paid; on condition only of ſubrogating the principal debtor to his remedy over againſt the creditor who may be inſolvent, in order that the principal debtor may procure payment if he can. This is the deciſion of the law 29, §. 2, ff. *mand.* The principal debtor is in fault for not having informed the ſecurity that he had paid.

This deciſion ought not to be admitted when the ſecurity bound himſelf for the debtor without his knowledge;

for in this case the principal debtor is not in fault for having failed to give this security, whom he did not know, notice of the payment.

Third condition.

438. A third case, in which the security who has paid has no recourse against the principal debtor for the sum which he has paid, is when, on account of his failing to give notice of it to the principal debtor, the latter has paid the creditor a second time. But he may require the debtor to cede to him his action against the creditor who has received what was not due him, to claim it back. This is the decision of the law 29, §. 3, ff. *mand.*

In our jurisprudence, these cessions are presumed: and the security in such case would be allowed to claim back from the creditor *recta via*, what he received a second time.

§. IV.

When may the security who has paid have his recourse.

439. Regularly the security who has paid, may have his recourse against the principal debtor, as soon as he has paid for him: but if he had paid before the time of payment had arrived, he could not have his recourse till the arrival of the time. For he ought not by his own act to deprive him of the delay to which he was entitled; L. 22, §. 1, L. 51, ff. *mand.*

§. V.

Whether, when there are several principal debtors, the security has an action against each of them and for how much.

440. The security may by the action *contraria mandati*, or by the action *contraria negotiorum gestorum* proceed against each of the principal debtors for whom he was a security to recover the whole of what he has paid. For each of these principal debtors being debtor of the whole debt towards the creditor, the security by binding himself for them, and by paying, has discharged each of them from the whole and consequently he has the right of claiming from each of

them the reimburſement of the whole of what he has paid, with intereſt from the day of his demand.

If what the ſecurity has paid was for arrearages and intereſt, theſe arrearages and intereſt, form a principal with regard to the ſecurity who has paid them, againſt the debtor for whom he has paid them, and intereſt on it is due to the ſecurity from the day of his demand. See a caſe reported by Papon, 4, 20; obſerve however, that for the ſum which he has paid for theſe arrearages and intereſt, the ſecurity who cauſed himſelf to be ſubrogated to the rights of the creditor, will ſtand in regard to the property of the debtor againſt whom he uſed his recourſe, in the ſame condition as the creditor would if he had not been paid: but as to the intereſt of that ſum which we ſay is due him from the day of the demand, as it is in his own right that he may require it, he will have a claim on the debtor's property only from the day of the contract of indemnity made before a notary-public, if ſuch an inſtrument was made, or if there were none from the day of the judgment obtained againſt him.

The ſecurity, who requires from one of the principal debtors for whom he was bound, the whole debt which he has paid, ought to cede to this debtor not only the actions which he has, in his own right againſt the other debtors, but alſo the actions of the creditor to which he ought to have procured himſelf to be ſubrogated on paying him. If the ſecurity in paying the creditor, has neglected to require the ſubrogation, and thus diſabled himſelf from procuring the ſubrogation to the one of the principal debtors from whom he requires the whole debt which he has paid, this debtor will be allowed, on tendering to reimburſe him for his part, to claim, *per oppoſitam exceptionem cedendarum actionum*, to be diſcharged from the demand of the ſecurity for the part of the other principal debtors.

It is ſo when the debtor has really an intereſt to have the ſubrogation of the actions of the creditor. But if he had no intereſt in this ſubrogation, if the ſubrogation to

the actions which the ſecurity has in his own right, gives him the ſame claim upon the property of his co-debtors, as the ſubrogation to the actions of the creditor, in this caſe he is not to be allowed to complain that the ſecurity did not, on paying, require the ſubrogation to the actions of the creditor and cannot procure it. He is therefore not to be allowed the plea *cedendarum actionum*.

This will be illuſtrated by the following example. *Finge*. Several debtors have borrowed *in ſolidum* a ſum of money from a creditor under my ſecuritiſhip, and they have given me a deed of indemnification, before a notary-public, of the ſame date with the obligation contracted towards the creditor. I have paid the debt without requiring the ſubrogation to the actions of the creditor; I demand the reimburſement of the whole from one of the debtors. It is evident that he cannot complain that I am unable to procure him the ſubrogation to the actions of the creditor; for the action which I have in my own right againſt the co-debtors and to which I am ready to ſubrogate him, having an hypothecation reſulting from the deed of indemnification bearing the ſame date with the hypothecation of the actions of the creditor, the ſubrogation to the actions which I offer him, procures him the ſame claim upon the property of his co-debtors, as the ſubrogation to the actions of the creditor would have procured him, and conſequently renders him without intereſt and prevents his being received to complain that I cannot procure it.

When the ſecurity bound himſelf only for one of the debtors *in ſolidum* and not for the others, he has, after he has paid the debt, a direct action only againſt him for whom he was a ſecurity. He can only, as uſing the rights and actions of his debtor, uſe thoſe which this debtor, on paying the debt, might have uſed againſt them, and in the ſame manner; of which ſee *ſupra*, *n.* 281.

ARTICLE II.

Of the caſes in which the ſecurity has an action againſt the principal debtor, even before he has paid.

441. The law 10, *Cod. mand*, recognizes only three

caſes in which the ſecurity may, before he has paid the debt, proceed againſt the debtor for whom he was bound, in order to procure himſelf to be indemnified by him. *Si pro ea contra quam supplicas fidejussor, seu mandator intercessisti, & neque condemnatus es, neque bona sua eam dilapidare postea cepisse comprobare possis, ut tibi justam metuendi causam præbeat; neque ab initio ita te obligationem suscepisse, ut eam possis & ante solutionem convenire; nulla ratione, antequam satis creditori pro ea feceris, eam ad solutionem urgeri certum est; d.* L. 10.

The firſt caſe mentioned in this law, is when a judgment has been had againſt the ſecurity, *si neque condemnatus es.*

According to our juriſprudence, the ſecurity is not obliged to wait till there is a judgment againſt him. As ſoon as he is ſued by the creditor, he may cite the principal debtor to defend and exonerate him. He is even bound to do ſo. On his failing, the debtor is not bound to reimburſe him for the coſts that may accrue before he is brought in as a party to the ſuit, excepting the coſts of the firſt proceſs and the coſts that may accrue ſince he is made a party to the ſuit.

The debtor whom the ſecurity has not called in, may ſometimes indeed defend himſelf from paying the debt for which judgment has been had againſt the ſecurity, when the debtor had a good plea againſt the creditor's demand, which he might have availed himſelf of had he been called in; *supra, n.* 432.

The ſecond caſe is, when the affairs of the debtor are deranged, *neque postea bona sua dilapidare comprobare possis.* In this caſe the ſecurity, though he may not yet have paid, may attach the property of the principal debtor that it may be holden to anſwer the debt for which he is bound.

The third caſe mentioned in the law is when the debtor bound himſelf to procure to the ſecurity the diſcharge of his ſecuritiſhip within a certain time. In ſuch caſe, when the time is expired, the ſecurity may ſue the principal

debtor to make him procure the discharge or to pay the debt.

The law says, *neque ab initio*, because according to the principles of the civil law, this agreement ought to have intervened at the time of the mandate; the agreements which do no not intervene till after the contract being only simple pacts, which according to the subtilty of the civil law produced no action. See in *Pand. Justin, tit. de pactis, n.* 34. These subtilties have not been received in our jurisprudence; it is immaterial whether the agreement intervened at the time of the contract or since.

The law 38, §. 1, *mand.* mentions a fourth case, *si diu reus in solutione cessavit.* According to this law, although there had been no clause by which the principal debtor bound himself to procure the discharge of his security within a certain time, yet the security whose obligation has continued a considerable time after, may sue the principal debtor to compel him to procure his discharge. The law, by this word *diu*, designates a considerable time, but does not determine it precisely. Bartolus judges it to be two or three years; several other authors hold it ten years from the date of the securitiship. Nothing can be determined in regard to it. It ought to depend on circumstances and should be left to the arbitration of the Judge *gl. ad. d.* L. 38.

442. When the obligation to which the security has acceded is from its nature to continue a certain time, however long it may be, the security cannot during this time require the principal debtor to procure his discharge, for he knew or might have known the nature of the obligation to which he acceded, and ought to have considered that he would remain bound during the whole of that time. Therefore he who became the security of a guardian for the management of the affairs of his ward, cannot require from the guardian, while the guardianship continues, that he should procure the discharge of his securitiship; because the obligation that results from the administration of the guardianship, cannot have an end before the guardianship. For the same

reaſon, he who has become the ſecurity of a huſband to his wife, for the reſtitution of her portion, cannot require from the huſband, while the marriage continues, to be diſcharged from his ſecuritiſhip, becauſe the obligation is of a nature that it cannot be diſcharged till after the diſſolution of the marriage.

Article III.

Whether the security for an annuity may compel the debtor to redeem it.

443. There is either an agreement between the principal debtor and the ſecurity, that the debtor ſhall be bound to diſcharge him from his ſecuritiſhip at the end of a certain time agreed upon by the parties, or there is no agreement to this purpoſe. The firſt caſe has leſs difficulty, yet it is not without ſome apparent difficulty. It may be ſaid that ſuch an agreement is not valid, being contrary to the nature of annuities, of the eſſence of which it is that the debtor can never be compellable to redeem. It is added that ſuch agreements, were they permitted, would give room for the frauds of creditors, who in order to provide the means of compelling their debtors to the redemption of the annuities, would not purchaſe without a ſecret condition that a confidential perſon ſhould intervene as a ſecurity, with whom the debtor would agree to redeem the annuity at the end of a certain time, and in this way theſe creditors would procure to themſelves uſurious annuities, without paſſing the principal. Notwithſtanding theſe reaſons, Dumoulin, *Tract de Usur.* 9, 30, decides that this agreement is valid; that the ſecurity may, at the end of the appointed time, require from the principal debtor that he procure his diſcharge from the ſecuritiſhip, and that for this purpoſe he ſhould be holden to reimburſe the principal. If it be oppoſed to this agreement that it is of the eſſence of annuities that the debtor cannot be compelled to redeem, the anſwer is that it is indeed of the eſſence of theſe annuities that the debtor cannot be compelled by the creditor to redeem, but nothing prevents his being compellable thereto by a third perſon. It is the perfect alienation of the

principal, which the creditor has paid for the purchaſe of the annuity, that conſtitutes the eſſence of the annuity; but it ſuffices, for this alienation, that the creditor of the annuity ſhould not have retained the right to recall the principal, and that he can never compel the debtor to pay it. It is indifferent that the debtor may be compelled thereto by a third perſon. As to the ſecond objection drawn from the fraud, the anſwer is that fraud is not to be preſumed. It is true that the allowance of ſuch an agreement may ſometimes give room for the kind of fraud mentioned above, and this is an inconvenience: but if, under the pretence of this inconvenience, this agreement, which in itſelf has nothing unlawful, ſhould be prohibited, a greater evil would reſult, that men could ſeldom procure money to anſwer their exigencies, not being able to find ſecurities who would be willing to contract an obligation the duration of which ſhould be unlimited.

The ſecond caſe, which is that in which there has been no agreement between the principal debtor and the ſecurity, has more difficulty. Dumoulin, *ibid*, decides that in this caſe the ſecurity can at no period whatever compel the debtor to redeem the annuity in order to diſcharge him from his ſecuritiſhip; becauſe the nature of the annuity being that it continues for ever till the debtor is pleaſed to repay the principal, the ſecurity who knew its nature, and was willing to be a ſecurity for it, has ſubmitted to contract an obligation which is perpetual as is the annuity: *Non obstat*, ſays he, *quod diu vel perpetuo remanebit in obligatione, quia hoc est de natura obligationis, & sic prævisum fuit, & tamen fidejussit, & se perpetuo obligavit: simplex autem promissio indemnitatis intelligitur secundum naturam obligationis principalis.* Thus, he adds, he who becomes a ſecurity for one who takes a leaſe of eighty years, contracts a ſecuritiſhip of this duration: thus the ſecurities for a guardianſhip, the ſecurities of a huſband for the reſtitution of the marriage portion, contract a ſecuritiſhip which is to continue as long as the guardianſhip or marriage, and from which they cannot ſooner be diſcharged. Such have been the deciſions in the

Parliament of Toulouſe, as Catelan ſhews, in v. 2, L. 5. ch. 21. Notwithſtanding theſe reaſons, we hold in our courts that even in the caſe in which there has been no agreement between the principal debtor and the ſecurity, when the ſecurity bound himſelf at the ſolicitation of the debtor and his ſecuritiſhip has continued a very conſiderable time, as, at the leaſt, ten years, the ſecurity is well grounded in requiring the principal debtor to diſcharge him, on paying the principal within a reaſonable time to be fixed by the judge. The reaſon is, that if an annuity is of a nature to continue 'till it be redeemed, it is alſo of a nature to be always redeemable. If the ſecurity for the leſſee of a long leaſe, the ſecurity of a guardian, or of a huſband for the reſtitution of the marriage portion, cannot be diſcharged till after the expiration of the leaſe, guardianſhip, or marriage; it is becauſe it is of the nature of theſe obligations not to be determinable before. Therefore he who becomes a ſecurity for ſuch obligations, ought to have conſidered that his ſecuritiſhip would not ſooner have an end. But annuities being always redeemable, and being frequently redeemed, he who became a ſecurity for the debtor, depended on the debtor's redeeming the annuity and that his ſecuritiſhip would not endure for ever. Therefore when it continues too long he ought to be admitted to demand that the debtor ſhould diſcharge him by redeeming the annuity. This is the opinion of Baſnage, *p.* 2, *ch.* 5. Lacombe has reported a caſe in which it was thus adjudged.

The right which reſults from this agreement, that the creditor ſhall be bound to redeem the annuity within a certain time agreed upon, in order to diſcharge his ſecurity, is not to be exerciſed with rigor; therefore if the ſecurity at the end of the time, proſecutes the debtor to compel him to redeem, the judge ought readily to grant the debtor a further time to perform this obligation, when he cannot conveniently do it immediately. *Molin, ibid.*

444. When the ſecurity who has required an agreement that the debtor ſhould redeem the annuity within a certain time, has become the ſole heir of the creditor of

the annuity, or when, on his becoming heir, for part, of his eſtate, the whole of the annuity has fallen to his ſhare; it is evident that he can no longer require from the principal debtor the redemption of the annuity: for his ſecuritiſhip is in this caſe extinguiſhed, as he cannot be a ſecurity to himſelf. He can no longer be admitted therefore to demand that the debtor diſcharge him from a ſecuritiſhip which no longer remains and from which he is already freed.

Quid, if the annuity for which he became a ſecurity to the anceſtor, has fallen to the ſhare of his co-heir, or the diviſion has not yet been made? Dumoulin, *ibid.*, decides that if the ſecurity has become the heir of the creditor only for a ſmall part, he may in both caſes, in his own right, compel the debtor to procure him the diſcharge of his ſecuritiſhip, by redeeming the annuity; but that if he has become the heir of the creditor for a conſiderable part, as for a half or a third, he cannot, in either caſe, require from the debtor this diſcharge. The reaſon he alledges is that the ſecurity in becoming heir for a conſiderable part of the annuity, has become a creditor of this annuity for a conſiderable part; and that this quality of creditor of a conſiderable part of the annuity, which he has, or had before the diviſion, oppoſes his right to require from the debtor the redemption, in order to be diſcharged from his ſecuritiſhip; the more ſo, as it is or has been eaſy for him to procure this diſcharge in another manner, by taking the annuity to himſelf in the diviſion.

I ſhould find much difficulty in yielding to this deciſion of Dumoulin, eſpecially in the caſe in which the whole annuity has fallen to the co-heir of the ſecurity; for, according to the principles of our juriſprudence, with regard to the declarative and retroactive effect of the diviſion, which was not ſo well eſtabliſhed in the time of Dumoulin as at this day, an heir is holden to have ſucceeded to the anceſtor only for the eſtate which has fallen to his ſhare by the diviſion. The ſecurity, therefore, is never holden to have ſucceeded to the annuity for which he became a ſecurity to the anceſtor, the whole of which annuity has fallen in the

diviſion, to the ſhare of his co-heir: he therefore has not, and is holden never to have had, as to any part, the quality of creditor of this annuity; nothing then can prevent him from requiring in his own right that the debtor redeem the annuity and thereby diſcharge him from his ſecuritiſhip. As to what Dumoulin adds, that it was eaſy for the ſecurity to procure to himſelf in another manner a diſcharge from his ſecuritiſhip, by taking the annuity to himſelf in the diviſion, I anſwer, I. that this did not depend entirely upon the ſecurity; his co-heir, who might have preferred the annuity to the other parts of the eſtate could have required that chance ſhould decide it. II. Although this had depended on the ſecurity, I do not ſee that he could have been obliged, for the ſake of the debtor, to take the annuity rather than other parts of the eſtate, which he might think more advantageous to him.

The caſe in which the diviſion has not been made, has more difficulty. I would think that in this caſe, the action being brought by the ſecurity againſt the debtor for the redemption of the annuity, the proceedings ſhould be ſtayed till after the diviſion; for it is not equitable that the ſecurity ſhould proſecute the debtor for the redemption, while he has the expectation of acquiring the diſcharge of his ſecuritiſhip by the diviſion in which this annuity may fall to his ſhare.

Quid, if the diviſion was made, and the annuity remained in common to the ſecurity and his co-heir? I grant that in this caſe the capacity of creditor for a part of the annuity which the ſecurity has, prevents him from requiring the debtor to redeem the whole annuity. But why ould he not, in declaring that he conſents that it may be ontinued for the part that fell to his ſhare, require him to edeem it for the part that fell to the ſhare of his co-heirs, o that he may be releaſed from his ſecuritiſhip? I ſee nothing that ought to prevent it.

The ſecurity ceaſes to have the right of requiring that the principal debtor redeem the annuity, not only when it is as heir that he became owner and creditor of the annui-

ty, but alſo when he becomes ſo in any other manner, either by title to the whole or a part, *puta*, if he becomes univerſal donee or legatee of the creditor of the annuity, or particular donee or legatee: for he has only a right to require the redemption of it, to be diſcharged from his ſecuritiſhip, and he has no longer any need to be diſcharged, when he has become owner of the annuity in any manner; for then his ſecuritiſhip is extinguiſhed, ſince no one can be a ſecurity to himſelf.

If the property in the annuity which the ſecurity has acquired be a defeaſible right, *puta*, if he were donee or legatee of the annuity under the charge of a ſubſtitution; the obligation of his ſecuritiſhip would be ſuſpended rather than extinguiſhed. It would revive if his right ſhould be defeated, *puta*, by the happening of the contingency on which the ſubſtitution was to take place. Therefore the ſecurity could not indeed require the redemption of the annuity whilſt he was owner of it; but his right to the property happening to be determined and conſequently the obligation of his ſecuritiſhip being revived towards him to whom the property of the annuity had paſſed, the right of requiring the debtor to redeem the annuity in order to diſcharge him from the ſecuritiſhip, ought likewiſe to be revived; and the time during which the debtor had agreed to redeem, which had ceaſed to run while the ſecurity was owner of the annuity, will begin again to run.

But if the ſecurity who became owner of the annuity, ceaſes to be owner of it, by a voluntary alienation which he makes, and not by the determination of his right, the obligation of his ſecuritiſhip is not revived, nor, conſequently, his right of requiring from the debtor the redemption of the annuity. *Molin. ibid. queſt.* 29, *n.* 246.

If the ſecurity himſelf had redeemed the annuity, though he had procured himſelf to be ſubrogated to the actions of the creditor, and by means of this ſubrogation he might revive it againſt the debtor, yet he may, by not availing himſelf of the ſubrogation, claim

debtor the principal ſum which he has paid for this redemption. The reaſon is, that a mandatary may reclaim, *actione mandati contraria*, all that he has been obliged to diſburſe, *quidquid ex causa mandati ipsi inculpabiliter abest. (V. Pand. Justin. tit. mand. n. 53, & seq.)* It is the ſecuritiſhip which the ſecurity has entered into at the ſolicitation of the debtor that compelled him to redeem, in order to put an end to his obligation: therefore this ſum *ipsi abest ex causa mandati, & quidem inculpabiliter.* For the principal debtor cannot diſapprove of this diſburſement, ſince he had bound himſelf to redeem in order to put an end to the obligation of his mandatary, if the ſecurity had not. Therefore this principal debtor cannot defend himſelf from reimburſing this ſum. *Molin. ibid. quæst.* 30.

Whether the ſecurity has paid money for the redemption of the annuity, or whether, with the conſent of the creditor, he has paid any thing elſe as an equivalent for the ſum by which the annuity was redeemable, he has a right to claim back the money from the principal debtor: for in either caſe, *ipsi ex causa mandati abest.*

Obſerve that if the ſecurity had redeemed the annuity before the expiration of the time within which the debtor had bound himſelf to redeem, he could not claim this money back till after that time. Indeed after this time, the claim ought not to be rigorouſly urged, and when it is made the judge ought eaſily to grant ſome delay to the debtor to procure the money.

We have ſaid that the ſecurity who has redeemed the annuity can only claim the reimburſement of the monies paid for the redemption of the annuity from the principal debtor, inaſmuch as he has not uſed the ſubrogation allowed him in order to revive the annuity. Why? It would ſeem on the contrary, that the ſecurity having two capacities, *duarum personarum vices sustinens*, might exerciſe at once the different rights that reſult from theſe two capacities, viz. that of requiring the continuation of the annuity,

as being ſubrogated to the rights of the creditor, and that which he has in his own right of requiring that the principal debtor ſhould redeem the annuity. It ſeems that he may the more ſo, as the principal debtor does not appear to ſuffer by this any inconvenience; ſince if the ſecurity had not made the redemption, the ſecurity might require that he ſhould make it; and notwithſtanding this demand of the ſecurity, he would not ceaſe to be liable to pay the arrearages to the creditor, until he had made the redemption: it is indifferent to him whether he pays to the ſecurity who is ſubrogated to the rights of the creditor, or to the creditor. Notwithſtanding theſe reaſons, Dumoulin, *quæst.* 29, decides that the ſecurity who wiſhes to avail himſelf of the right of ſubrogation and to take the annuity, cannot afterwards exerciſe the right which he had to require the redemption; becauſe theſe are rights abſolutely incompatible. The creditor of an annuity, or he who wiſhes to exerciſe his rights, is, in this capacity, bound to procure to the debtor the free enjoyment of the principal of the annuity, as long as he pleaſes; which is inconſiſtent with the right to require the reimburſement of the principal.

Dumoulin, *quæst.* 30, *n.* 249, adds this modification to his deciſion, that if the ſecurity, being ignorant of the law that he could not have at the ſame time the right to revive the annuity for his benefit, and that to require the redemption of it, had received one or two years arrearages, he would notwithſtanding be allowed to require the redemption, on offering to renounce his ſubrogation to the rights of the creditor, and conſequently to apply the arrearages he has received to the principal.

Article IV.

Of the actions of the security against his co-securities.

445. A ſecurity may indeed bring againſt his co-ſecurities the actions of the creditor, when he has had the precaution to cauſe himſelf to be ſubrogated; but, according to the civil law, he had not in his own right any action a-

against them, even in the case in which he had paid the debt: this is the decision of the law 39, ff. *de fid.*; L. 11, *God. d. tit.*

The Roman jurists ground their decision on the following principle. When several persons become securities for the same debtor, they do not contract towards each other any obligation: neither of them has any other intention than to serve the principal debtor; each proposes to himself the accommodation of the principal debtor and not that of his co-securities: *Solius rei principalis negotium gerit, non aliter alterius negotium gerit.*

This principle is true and it may indeed be said, evident: but the consequence which the Roman jurists have derived from it, that a security can never, without the subrogation of actions, have any recourse against his co-securities, even when he has paid the whole debt for which they were all liable, is a consequence too hard and which we have not admitted in our jurisprudence. On the contrary, our jurists have thought that the security who has paid the whole debt, may, without a subrogation, claim back a part of it from each of his co-securities. This was the opinion of d'Argentré, on *art.* 213 of the antient custom of Brittany; and it was incorporated into the present system at the reformation. *art.* 194.

This action does not arise from the securitiship which this security has entered into with his co-securities, since by this securitiship they have not contracted any obligation towards each other, according to the principle above established: it arises only from the payment which this security has made of the whole debt, and from equity, which does not permit that his co-securities, who were liable equally with him for the debt, should profit at his expence by the payment which he has made of it. This action is not the true action *negotiorum gestorum.* This security who has paid the whole debt, having paid what he really owed, has discharged his own obligation, *proprium negotium gessit, magis quam cofidejussorum:* but it is an action *utilis negotiorum ge-*

torum, quæ non ex subtili juris ratione, sed ex sola utilitatis & æquitatis ratione proficiscitur; becauſe, although this ſecurity, *ipsius inspecto proposito*, in paying the whole debt, has done an affair of his own rather than that of his co-ſecurities; yet, *effectu inspecto*, having, as to the effect, done an affair which concerned his co-ſecurities equally with himſelf, having by the payment which he had made diſcharged them from a debt which they owed equally with him, equity requires that they ſhould bear their part of this payment, by which they have profited as much as he.

There are ſome authors who have gone much farther and have maintained that in the caſe of the inſolvency of the principal debtor, a ſecurity had an action in his own right againſt his co-ſecurities, not only after he had paid the creditor, to recover from them their parts of what they were bound equally with him to pay to the creditor; but even before he had paid, to make them contribute with him towards the payment of the ſum which they all owed to the creditor. They have gone ſo far even as to ſay that in the caſe of the inſolvency of a debtor of an annuity, a ſecurity who had been for a conſiderable time a ſecurity for the annuity, had an action againſt his co-ſecurities to compel them to contribute with him towards the redemption of the annuity. See Baſnage, *Trait. des Hypoth. part.* 2, *ch.* 6, who cites ſome caſes in the Parliament of Normandy which have been ſo adjudged; and Brodeau *on Loüet, letter F. ch.* 27, who cites alſo a caſe determined in the Parliament of Paris. But I think that theſe authors have proceeded too far. I grant that when one of the ſecurities is ſued by the creditor, this ſecurity who is ſued has an action againſt his co-ſecurities to compel them to furniſh each his part of the ſum demanded, the payment of which would diſcharge the action; and that on their failure to pay their proportion, they would be liable each for his part of the coſts incurred ſince the ſuit has been notified to them. This action ariſes from the ſuit brought againſt the ſecurity, and from equity, which does not permit that among ſeveral perſons

who are equally liable for the ſame debt, one of them ſhould be ſued rather than the others. It is on this reaſon of equity that the benefit of diviſion among the co-ſecurities has been eſtabliſhed. This ſame reaſon of equity which allows one ſecurity who is ſued for the payment, to require the creditor to divide his action and ſue all the ſecurities, ought likewiſe to allow him to require his co-ſecurities to contribute, each his part, towards the payment of the debt, and on failure, towards the payment of the coſts incurred ſince the ſuit was notified to them. He ought to be allowed to require this, even when he has renounced the benefit of diviſion, or when he is excluded from it by the nature of the debt for which the ſecuritiſhip was contracted; this renunciation and this excluſion applying only in favor of the creditor.

But while the ſecurity is not ſued for the payment, he has no action againſt his co-ſecurities to oblige them to contribute with him towards the payment of the debt: for the co-ſecurities, according to the principle above eſtabliſhed, not having intended to contract between themſelves any obligation, that from which ariſes the action which the ſecurity has againſt his co-ſecurities, when he is ſued, is founded only on a reaſon of equity which proceeds from the ſuit that is brought againſt him; whence it follows that he cannot have any action until he is ſued. *A fortiori*, the ſecurity of an annuity cannot, in caſe of the inſolvency of the principal debtor, have an action againſt his co-ſecurities to compel them to contribute with him towards the redemption of the annuity; for from what obligation could this action ariſe? When the ſecurity has redeemed the annuity, he can demand nothing more from his co-ſecurities than the continuation of the annuity, each for his part: for the action which he has againſt them can only ariſe from the rule of equity which does not permit his co-ſecurities to profit at his expence by this redemption; theſe co-ſecurities deriving from this redemption no other benefit than the diſcharge from the payment of the annuity, they cannot be liable for any thing elſe than to continue each

for his part an annuity equal to that from which the redemption had discharged them in regard to the creditor.

A security who has paid a debt that is demandable, or redeemed an annuity, has an action against the other principal securities, and in case of the insolvency of one of them, against the securities of this insolvent security, who represent him; but he has no action against his own security who bound himself for him: for he is simply the security of him for whom is bound, *fidejussor fidejussoris*; the security in regard to his own securities holds the place of a principal debtor, *instar rei principalis*.

By the same reason, when the security of a security has paid, he has a recourse for the whole against the security for whom he bound himself.

SECTION VIII.

Of several other kinds of accessory obligations.

ARTICLE THE FIRST.

Of the obligation of those who are called in law MANDATORES.

446. He by whose order I have lent money to another, is called in law *mandator pecuniæ credendæ; toto tit.* ff. *de Fidej. & mand.*

When you give me an order to lend a certain sum of money to Peter, this order which I undertake to execute, includes a contract of mandate which takes place between us.

According to the principles of the contract of mandate, the mandatary being bound towards the mandator, *actione mandati directa*, to account with him for all he has *ex causa mandati*, I am by this contract, in my capacity of mandatary, bound *actione mandati directa*, towards you who are the mandator, to cede to you the action which arises from the loan of the sum of money which I have made in the execution of your mandate, and which is consequently *ex causa mandati*.

On your side you are bound towards me *actione mandati*

contraria to reimburſe and indemnify me for the ſum which I have diſburſed in the execution of your mandate, by lending the ſum of money through your order to Peter. By this obligation you become bound towards me to anſwer for the debt of Peter which he had contracted to me by the loan which I have made to him.

In this *mandatores pecuniæ credendæ* agree with ſecurities.

We need not however confound them; there is an eſſential difference between the one and the other.

The obligation of a ſecurity is no other than a ſimple acceſſory to the obligation of the principal debtor, which has for its conſideration that of the obligation of the principal debtor. For example. When you become a ſecurity towards me for a ſum of money which I have lent to Peter, or for a ſum of money which Peter owes me for the price of a thing which I have ſold him, the ſecuritiſhip which you contract is only a ſimple acceſſion to the obligation of Peter; the cauſe of your obligation, as well as that of Peter's, to which you have acceded, is the ſale or the loan which I have made to Peter.

It is not the ſame of the obligation which you contract with me by the order you give me to lend a certain ſum to Peter. It is true that it has the ſame object with that which Peter contracts with me by the loan which I have made to him through your order: the ſum of money, for which you are bound, *actione mandati contraria*, to reimburſe me, is not a like ſum, but it is preciſely the ſame ſum which is due me by Peter, and I am not allowed to receive it from you and from him, according to the rule, *bona fides non patitur ut idem bis exigatur*; L. 57, ff. *de. R. J.* But although your obligation has the ſame object with that of Peter's, although the ſum which is due me by you and by him, is one and the ſame thing, of which Peter is the principal debtor, ſince he is debtor of it for himſelf abſolutely, and you are debtor of it rather for him than for yourſelf; yet your obligation is not a mere acceſſion to that of Peter; it

has a different conſideration from that of the obligation of Peter, which is the contract of mandate that took place between us. This contract is not merely a ſimple acceſſory contract, ſuch as is a ſecuritiſhip; it is a principal contract: your obligation which ariſes from this contract, which is an obligation *ex causa mandati*, has therefore a conſideration different from that of the obligation of Peter, who is my debtor *ex causa mutui*.

From theſe principles on the difference of the obligation of a *mandator pecuniæ credendæ*, and of that of a ſimple ſecurity, follows this difference between the one and the other, that when a ſimple ſecurity has paid the debt for which he became a ſecurity, without requiring, in making the payment, the ceſſion of the actions of the creditor againſt the principal debtor, he extinguiſhes by this payment the debt of the principal debtor, and he cannot afterwards cauſe the actions of the creditor to be ceded to him, when theſe actions have been extinguiſhed by this payment; for his debt being not only a debt of the ſame thing, but preciſely the ſame debt as that of the principal debtor, to which he has only acceded, the payment which he has made has extinguiſhed the debt of the principal debtor.

On the contrary when a *mandator pecuniæ credendæ*, by the order of whom I have lent a certain ſum to a third perſon, *puta*, to Peter, reimburſes me for this ſum; although he has not required the ceſſion of my actions againſt Peter, the payment which he makes me extinguiſhes only his own obligation, and that of Peter is not extinguiſhed: I remain, notwithſtanding this payment, creditor of Peter *ex causa mutui*, not to the effect that I may exact for my benefit the ſum which is due me by Peter *ex causa mutui*, having already been paid *ex causa mandati*; but I remain his creditor to the effect that I may cede the rights of this debt to my mandator when he ſhall require me to do ſo, as I am bound *obligatione mandati directa* to cede them to him. This we learn from the law 28, ff. *mand. Papinianus ait mandatorem debitoris solventem ipso jure rem non liberare, propter*

enim mandatum suum solvit & suo nomine; ideoque mandatori actiones putat adversus reum cedi debere; although he did not require this ceffion at the time of the payment.

Thefe differences being excepted, the *mandatores pecuniæ credendæ* agree with fecurities: altho' the obligation *contraria mandati*, which they contract towards him who has lent to another a fum of money thro' their order, is not entirely, as is a fecuritifhip, a mere acceffion to the obligation of the debtor to whom the fum has been lent thro' their order and it has its own confideration, *propriam causam*, it is however, as is that of fecurities, acceffory to the obligation of this debtor, and depends upon it: it is valid only in the fame manner as the obligation of this debtor is valid; mandators may plead all pleas *in rem*, which could be pleaded by the debtor to whom the thing has been lent thro' their order; L. 32, ff. *de fidej.* The extinction of the obligation of this debtor, in whatever manner it may take place, whether by actual payment of the fum lent, or by fet-off, novation, releafe, or confufion, extinguifhes the obligation of thefe mandators, in the fame manner as it extinguifhes that of fecurities. The novel 4, §. 1, has given them, as it has to fecurities, the plea of difcuffion. All we have faid of this plea, *supra*, *sect.* 6, *art.* 2, applies to mandators in the fame manner as it does to fecurities.

In order that one may be reputed *mandator pecuniæ credendæ*, and confequently anfwerable to me for the fum of money which I have lent to a third perfon through his order, it is neceffary that what he faid or wrote to me fhould include an actual mandate, by which he has required me to lend this fum to this perfon, with the intention of indemnifying me for it. But if in a converfation, I told you that I had a thoufand crowns to place at intereft, and you informed me that Peter was feeking to take money at intereft and that you thought the money would be fafe in his hands, thefe expreffions include no mandate, but mere advice by which you contract no obligation towards me,

according to this rule of law: *Consilii non fraudulenti nulla est obligatio, nisi dolus intervenerit;* L. 47, ff. *de Reg. Jur.*

Obſerve, however, that in order that advice may not bind the perſon who gave it, it is neceſſary that it be given *bonâ fide*; therefore the law adds, *nisi dolus intervenerit:* for if you knew that the affairs of Peter were deranged when you adviſed me to lend him money, this would be a fraud on your part which would bind you, at leaſt in a moral view, to indemnify me for the loſs I ſhould ſuſtain by the inſolvency of Peter.

You might even be holden to be bound thereto *in foro legis*, if I had evident proof that you were well acquainted with his circumſtances. Likewiſe, we ought not to take for a *mandatum credendæ pecuniæ* what is only a recommendation. Thus, if you told me, "Peter, our common friend, wants "to borrow ten piſtoles from you, I recommend him to you;" theſe words contain no mandate, but only a recommendation, which is not obligatory; L. 12, §. 12, ff. *mand.*

It would be otherwiſe if you had ſaid to me: "Peter "wants ten piſtoles, I cannot now conveniently lend them "to him, I pray you to lend him that ſum for me." This is an actual mandate.

In order that a *mandator pecuniæ credendæ* may be obliged to indemnify you for the money which you lent to a third perſon, through his order, it is neceſſary that you ſhould have confined yourſelf ſtrictly to the terms of the mandate; *diligenter enim fines mandati custodiendi sunt;* L. 5, ff. *mand.* If then you have done another thing than that which is contained in my mandate; *puta*, if I had directed you to lend a ſum of money to Peter, and you have given it to him on a contract of annuity; *aut vice versa*, if I had directed you to give it to him on a contract of annuity, and you have lent it to him, I ſhall not be bound to you; for a contract of annuity and a contract of loan being different things, it cannot be ſaid that you have done what was contained in my mandate.

If I had given you an order to lend a certain ſum of

money to Peter, *puta*, five hundred livres, and you lent him six hundred livres, the sum of five hundred livres mentioned in my mandate being included in that of six hundred livres, which you lent him, according to this rule of law, *in eo quod plus sit, semper inest & minus;* L. 110. ff. *de Reg. Jur.;* it is proper to say that you have done what was contained in my mandate, and consequently I am bound to you, *obligatione mandati contraria*, for Peter, to the amount of five hundred livres. With regard to the remaining one hundred livres, as you have in this respect exceeded the limits of my mandate I am not bound to you for this overplus.

Vice versa, if you have lent to Peter, a less sum than the one mentioned in my mandate, I am bound to you for Peter; for you have executed my mandate in part.

If you have done indeed what was mentioned in my mandate, but not in the manner which I prescribed, I shall not be bound towards you. For example. If in the order which I gave you to lend a sum of money to Peter, it was mentioned that you should require pledges from him, which you did not require; or if it was mentioned that you should procure him to bind himself before a notary, in order that I might have a lien on his lands; and you only took his note. In these and like cases, I shall not be bound to you, because you have not done what was mentioned in the order which I gave you; L. 7, *Cod. de fidej.*

Contra, vice versa, if I had given you an order to lend Peter a certain sum of money, and to take only his note, without requiring any pledge or a security, and you caused him to bind himself before a notary, or required from him a pledge or a security, I cannot in this case complain that you did not confine yourself to the limits of my mandate; for you have done what was mentioned in it, in lending to Peter, the sum of money which I had requested you to lend him; and as what you have done besides cannot be otherwise than advantageous to me, I cannot complain of it.

If I gave you an order to lend a sum of money to Pe-

ter abſolutely, and in lending it to him you have granted him a certain time to pay it in, or the liberty of paying ſomething elſe inſtead of it, I ſhall not be bound to you; for in granting him this you have exceeded the limits of my mandate. I only bound myſelf, *actione mandati contraria*, to reimburſe you for the ſum which I had given you an order to lend him, provided you placed yourſelf in a ſituation, to cede to me, after I ſhould have reimburſed you for that ſum, ſuch actions as would have enabled me to require the ſum from Peter, as ſoon as I pleaſed, without his being able to give me any thing elſe in lieu of it: thus as, by the terms which you have granted to Peter, you have diſabled yourſelf from ceding ſuch actions to me, I am not bound to you for the loan which you made to Peter.

On the contrary, if I had given you an order to lend to Peter, a certain ſum, and to give him a certain time to pay it in, and you lent it to him without giving him any time to pay it in, I ſhall be bound to you for this ſum, but you will not have a right to demand it from me till after the time mentioned in my mandate. I cannot complain that you did not grant to Peter the time mentioned in my mandate; for, provided you have no right to require it from me before the expiration of that time, it is indifferent to me whether you may demand it ſooner from the principal debtor or not.

Article II.

Of the obligation of principals.

We ſhall ſee under this head, I. in what ſenſe principals accede to the obligations reſulting from the contracts of their agents, and in what they differ from other acceſſory debtors. II. In what caſes the obligation of theſe principals takes place. III. We ſhall ſpeak of the effects of this obligation. IV. Of the obligation of principals, acceſſory to the obligations which reſult from the torts of their agents.

§. I.

In what sense principals accede to the obligations resulting from the contracts of their agents.

447. When a merchant has committed to a perſon the management of a trading houſe or the command of a veſſel; and likewiſe, when the king's farmers have committed to a perſon the direction of a branch of the revenue, in all the engagements, which this agent contracts, even in his own name, relative to the affairs he is entruſted with, he binds himſelf as principal debtor, and he binds at the ſame time his principal as an acceſſory debtor: for this principal is preſumed, by the authority which he has given to his agent, to have agreed beforehand to all the engagements he ſhould contract relative to the affairs he intruſted him with, and to have made himſelf anſwerable therefor.

Theſe principals are acceſſory debtors of a different kind from ſecurities and *mandatores pecuniæ credendæ*. Theſe, ordinarily, in acceding to the obligation of the principal debtor, bind themſelves for the buſineſs of the principal debtor, and not for their own. On the contrary a principal, in acceding to the contracts of his agent, tranſacts his own buſineſs rather than that of his agent. If in the contract of the agent, the agent is looked upon as principal debtor and the principal as an acceſſory debtor, it is only becauſe the contract is made with the agent: the principal, who often has not even a knowledge of the contract, accedes to it only by the general adherence which he is holden to have given beforehand to the contracts his agent was to make, when he committed his buſineſs to him. But theſe contracts of the agent are rather the buſineſs of the principal than his own: while ſecurities and *mandatores pecuniæ credendæ* ought to be indemnified by the principal debtors for the obligations which they contract, it is on the contrary the principal who ought to indemnify the agent.

§. II.

In what cases the accessory obligation of principals takes place.

448. In order that this acceſſory obligation of the

principal may take place, it is requiſite that the agent ſhould have contracted in his own name, although for the affairs of the principal: but when he contracts in his capacity of factor or attorney of his principal, it is not he who contracts, it is the principal who contracts through his intervention; *supra*, *n.* 74: the agent in this caſe does not bind himſelf. It is the principal alone who, through the intervention of his agent, contracts a principal obligation.

When the agent contracts in his own name, in order that he may bind his principal, it is requiſite the contract ſhould relate to the buſineſs which is committed to him, and that the agent do not exceed the limits of his commiſſion. L. 1, §. 7, *tit.* 12, *de exerc. act.*

Such are the contracts of ſale, or purchaſe of goods made by an agent, in a trading houſe, the purchaſe made by the maſter of a veſſel of the things neceſſary to the repairs or fitting out of his veſſel, &c.

Money borrowed by an agent is alſo preſumed to have been borrowed for the buſineſs which is committed to him, when the contract contains a declaration of the cauſe for which the money is borrowed, and this cauſe actually relates to the buſineſs committed to the care of the borrower.

For example. If the maſter or ſupercargo of a veſſel, after a ſtorm or fight, during which the veſſel has ſuffered much injury, puts into port, and borrows money, declaring that he wants it to repair the veſſel, the owner or principal who employed him, will be bound by this loan.

It would even be holden that the owner or principal is bound, in ſuch caſe, even if his agent had waſted the money, and failed to employ it on the veſſel, if the want he was in was probable, and the ſum borrowed was not much above the ſum neceſſary for the purpoſe for which it was declared to be borrowed; L. 1, §. 8 & 9; L. 7, *princip.* & §. 1, ff. *de exerc. act.*

Agents bind their principals as long as their commiſſion continues; and it is always holden to continue until it be revoked, and until the revocation be publicly known.

Although regularly every mandate terminates with the death of the mandator; yet it has been eſtabliſhed for the convenience of commerce, that the commiſſion of ſuch perſons ſhould continue even after the death of the merchant who employed them, until it be revoked by the heir or other ſucceſſor: and in contracting in regard to the buſineſs which was committed to their management, they bind the heir of the merchant who employed them, or his vacant eſtate if he left no heir; L. 17, §. 2 & 3, 11, ff. *inſtit. act.*

For the ſame reaſon, the director of an office of finance, binds the ſucceſſors of the financier who employed him, as long as his commiſſion is not revoked.

§. III.

Of the effect of the accessory obligation of the principal.

449. This obligation extends to all that is contained in the obligation of the agent: it depends upon it, as all acceſſory obligations depend on the principal obligation to which they accede: therefore this obligation of the principal is extinguiſhed, when that of the agent is extinguiſhed by payment or novation, L. 13, §. 1, ff. *de inſt. act.* or in any other manner whatever. The principal may avail himſelf of all the pleas *in rem* or to the action, which the agent might have pleaded. He cannot take advantage of any defect in the obligation of his agent, ariſing from any incapacity of that agent: for the principal who employed him cannot argue againſt his own act and the choice which he made. Therefore, although a minor, in contracting, does not bind himſelf validly, *ne quidem naturaliter*, unleſs *quatenus locupletior factus est*, and conſequently ſecurities cannot intervene for him; yet when a merchant has entruſted his affairs to a minor, he is liable *inſtitoria actione* for all the obligations which reſult from the contracts of the minor, without being allowed to plead the nonage of the contractor. *Pupillus inſtitor obligat eum qui eum præposuit, inſtitoriâ actione; quoniam sibi imputare debet qui eum præposuit;* L. 7, §. *fin.* ff. *de inſt. act.*

The law ff. *de obl. & act.* says formally that a minor cannot bind himself, *ne quidem naturaliter*. I know, however, that there are contrary opinions. We have followed that of Cujas. See *in Pand. Just.* a scholium, after *n.* 17 of the title *de obl. & act.* in which we related at length the reasons on which this opinion is established and the objections against it. By natural obligation we mean that which, *in foro legis*, is recognized as a natural obligation and has *juris effectus*; for we do not deny that a minor *pubertati proximus*, if he knows what he is doing may bind himself *in foro conscientiæ*.

Cujas says that the law 127, *de Verb. obl.* which holds that securities may intervene for an infant, must be understood of the case in which he has been benefited by the contract.

450. With regard to the extent of the action *institoria*, which results from the accessory obligation of principals, some difference is to be observed between them and securities.

When several merchants, or several of the king's farmers-general, have entrusted a person with their commerce, the command of a vessel, or the direction of an office of revenue, they are liable *in solidum* for the obligations of their agent; L. 1, §. *fin.* & L. 2, ff. *de exerc. act.*; and they are not entitled to the plea of division, which is granted to securities. There is the more reason for its being so with us, as in our jurisprudence, partners are liable *in solidum*, for all the engagements relative to the partnership.

451. Securities, and even *mandatores pecuniæ credendæ*, have the plea of division, which was granted them by the novel of Justinian, of which we have spoken *supra, sect.* 6, *art.* 2, because they have contracted their obligation rather for the business of the principal debtor than for their own: but the obligation which a principal contracts *ex contractu institoris*, being an obligation which the principal contracts for his own business, he has not the benefit of the plea of

diviſion: even if he had beforehand indemnified his agent, and given him money to pay; but in this caſe the creditor ought, if it be required at the time of payment, to make him a ceſſion of his actions.

The ordinance of Marine, tit. 8. art. 2. grants a peculiar advantage to the owners of veſſels. It is that of diſcharging themſelves from the engagement contracted by the maſter, to whom they gave the command of their veſſel, by abandoning to the creditors, the veſſel and freight.

(What was in the firſt edition, under n. 452, has been inſerted in the beginning of this paragraph; therefore we have ſuppreſſed that number.)

§. IV.

Of the acceſſory obligation of principals reſulting from the torts of their agents.

453. It is not only, by contracting, that agents bind their principals. Whoever has committed to a perſon any function, is anſwerable for the torts and quaſi torts which his agent is guilty of in the exerciſe of the function which is committed to him; L. 5, §. 8, ff. *de inſt. act.* and if there be ſeveral principals they are all bound *in ſolidum* without being entitled to any plea of diſcuſſion or diviſion. For example. If an officer of the revenue, in making his viſit in an alehouſe, were to injure the keeper of it in his perſon or property, the King's farmers-general who employed him are bound by his tort, and are liable for the damages to which their agent will be condemned, ſaving their recourſe againſt him; becauſe their agent committed the tort in the exerciſe of his functions. If he had ill-treated or robbed the alehouſe-keeper, out of the exerciſe of his functions, they would not be liable for it.

This obligation of the principal is an acceſſory obligation to the principal obligation of the agent who committed the tort.

It extends to all that is contained in the principal ob-

ligation for the damages due to the perſon againſt whom the tort has been committed; but the principal is bound only *civiliter*, although the perſon who committed the tort, be conſtrainable by the impriſonment of his perſon. The principals cannot oppoſe to the action reſulting from the tort, the plea of diviſion, nor that of diſcuſſion; they may only, when they pay, require the ceſſion of the creditors actions.

§. V.

Of heads of families and masters.

454. Another kind of acceſſory obligation is that of heads of families who are reſponſible for the torts of their minor children and wives, not preventing them when they had it in their power to do ſo.

They are holden to have it in their power to prevent the tort when it was committed in their preſence. If it was committed in their abſence, we are to judge from circumſtances, whether they had it in their power to prevent it. For example. If a boy had a quarrel with his comrade and wounded him with his ſword, even in the abſence of his father, the laſt may be liable for the tort, as having had it in his power to prevent it; which he might have done, by not permitting his ſon to wear a ſword, eſpecially if he was of a quarrelſome temper.

455. What is ſaid here of a father extends to a mother, when after the death of her huſband, ſhe had the management of her children. It may likewiſe be extended to ſchoolmaſters, preceptors and all thoſe who have the care of children.

456. Maſters are alſo liable for the torts of their ſervants, not preventing them when they had it in their power ſo to do.

They are even liable for the torts which they could not prevent, when their ſervants committed them in the ſervice in which they were employed. For example. If your coachman, in driving your carriage brutally, careleſsly or

through want of skill, has caused any injury, you are personally liable for it; saving your recourse against him who is the principal debtor.

Heads of families and masters are not liable for the engagements contracted by their children or servants, unless it be proved that they committed and entrusted such children or servants with some business to which these engagements relate.

For example. If it were proved that I am in the habit of paying shop-keepers for the provisions delivered to my daughter or servant, a shop-keeper will be authorised to demand payment from me for the provisions which my daughter or servant bought from him, in my name; unless, I could prove I had given him notice not to furnish any, or what had been taken exceeded by a great deal what was necessary for the use of my family. If the shop-keeper fails in proving this, I ought to be discharged from his demand, on my swearing that when I sent my daughter or servant for provisions I gave them money to pay for them. *Arrêt du Journal des Audiences, vol. 5.*

Section IX. *and last.*

(Added in this new Edition*.)

Of the pact CONSTITUTÆ PECUNIÆ.

We omitted, in the first edition of this work, to treat of the pact *constitutæ pecuniæ*, and of the obligation resulting from it, which is in a manner an accessory obligation, since it is added to a prior obligation and is contracted only to strengthen it. We shall speak of it here.

1. The pact *constitutæ pecuniæ*, among the Romans, was an agreement by which one assigned to a creditor, a certain day or time, within which he promised to pay him; *diem solvendæ pecuniæ constituebat.* This is the result of the terms of the edict *de constitutæ pecuniæ.*

* *This section is numbered separately, in order that the numbers of the second volume may be conformable to those of the first edition.*

The word *pecunia*, in this edict, as in the law of the twelve tables, and in the other edicts of the Prætor, was used for all things corporeal as well as incorporeal, which constitute property, and which may be the object of obligations; *Pecunia nomine non solum numerata pecunia, sed omnes res, tam soli quam mobiles, & tam corpora quam jura, continentur*; L. 222. ff. *de verb. sign. Pecuniæ appellatione res significari Proculus ait*; L. 4. ff. *d. tit.*

According to our jurisprudence, the pact *constitutæ pecuniæ* may simply be defined an agreement by which one promises to a creditor to pay him.

2. This promise may be made to one's own creditor or to that of another.

When one, by this pact, promises to his own creditor to pay him, there arises a new obligation which does not destroy the first, by which he was bound, but accedes to it; and by this multiplication of obligations the right of the creditor is strengthened.

In this the right resulting from a personal claim differs from that of dominion and property. When I have, by virtue of any title, dominion or property over a certain thing, I can no more acquire this dominion or property by virtue of any other title. *Dominium non potest nisi ex una causâ contingere*; L. 3. §. 4. ff. *de acq. poss.*

On the contrary, although I be already creditor of a certain thing, by virtue of a title, I may still afterwards become creditor of the same thing, either from the same debtor, who may bind himself anew to give it to me, or from other debtors.

Paul, in L. 139, ff. *de Reg. Jur.* observes this difference between the right of dominion and the right of personal claim: *non, ut ex pluribus causis idem nobis deberi potest, ita ex pluribus causis idem potest nostrum esse.*

3. Of what use, will it be asked, may be to the creditor this new obligation contracted by the principal debtor towards him by the pact *constitutæ pecuniæ?* It is useful to him both in *foro conscientiæ* and in *foro legis*. In *foro conscientiæ*,

the more the obligations of the debtor are multiplied, the greater is the infidelity on his part if he fails in discharging them; and consequently the stronger is the right of the creditor to expect the performance of them. In *foro legis*, when the obligation of the debtor, who by this pact had promised to his creditor to pay him, was a more natural obligation, such as were at Rome all those which were formed of simple pacts, unclothed with the formalities of a stipulation: it is evident, in this case, that the obligation which the debtor contracted by the pact *constitutæ pecuniæ* was very useful, since it gave him an action which the first did not. The degree of infidelity which there is in violating repeated obligations, induced the Prætor to give an action against the debtor to compel him to perform the obligation arising from this pact: *quoniam grave est fidem fallere*; L. 1, ff. *de pec. const.*

When the obligation of the debtor, who by this pact had promised to his creditor to pay him, was a civil obligation, which gave him an action, the obligation and action which resulted from this pact were not indeed necessary; the pact however was not useless, and it seems it intervened as well with regard to civil obligations as with regard to natural obligations: *Debitum ex quacumque causa constitui potest, ex quocumque contractu, &c.* L. 1, §. 6, *& seq. de const. pec.* This pact was useful in determining the time within which payment was to be made, when none was expressed by the contract: and this determination served, according to the principles of the civil law, to put the debtor in arrear, *de jure*, by the lapse of time alone, when he did not perform his obligation: while, when no time was determined, the debtor could be put in arrear only by a judicial demand.

4. Even in the case in which the creditor would have no occasion for the pact *constitutæ pecuniæ* to fix the time of payment, which was already fixed and determined by the contract, Ulpian decides that the pact might be of some utility: *Si is qui & jure civili & Prætorio debebat, [illegible] diem sit*

obligatus, in constituendo teneatur ..... habet utilitatem, ut eâ die obligatus constituendo se eadem die soluturum teneatur; L. 3, §. 2, ff. *d. tit.*

To understand in what this utility might consist, we ought to reflect that according to the principles of the ancient Roman law, actions depended on embarrassing formulas, the least neglect of which caused the action to fail. It was consequently useful to have several actions for a debt of the same thing, so that if by any fault one of them failed, the creditor might resort to another. Hence altho' the obligation was a civil obligation which gave an action to the creditor, the pact *constitutæ pecuniæ*, which gave a new action, was not altogether useless.

5. The pacts *constitutæ pecuniæ* which had for object to determine a certain day, or a certain time within which one bound himself to a creditor to pay what was due him, are not much in use among us: for this determination of the time within which payment ought to be made, which, according to the principles of the civil law, was useful to the creditor, that the debtor might more easily be put in arrear, is ordinarily, according to the principles of our jurisprudence, of no use to the creditor; since in our practice, whether there be a time of payment or not, the debtor cannot ordinarily be put in arrear without process.

There are however, among us, certain agreements, which may be called pacts *constitutæ pecuniæ*, by which one promises to pay to a creditor what is due him. Such are those by which the heirs of a debtor give a new title to the creditor and bind themselves to pay what they owe him in their capacity of heirs. The new obligation which results from such an agreement is useful to the creditor, since it gives him the right of proceeding directly against those heirs, which he had not before.

We shall see on this pact, I. what is necessary to its validity; II. whether it necessarily includes a time within which the payment is to be made; III. whether, by this pact, one may bind himself to more, or another thing, or

in a different manner than by the firſt obligation; IV. what is the nature of the obligation which reſults from this pact. We ſhall ſpeak, in a fifth paragraph, of the pact by which one promiſes to a creditor to give him certain ſureties.

§ I.

Of what is necessary to the validity of the pact conſtitutæ pecuniæ.

6. It reſults from the definition which we have given of the pact *conſtitutæ pecuniæ*, that it ſuppoſes the pre-exiſtence of a debt which is promiſed to be paid to him who is the creditor of it. Therefore if, through error, I have agreed to pay you a certain ſum which I thought was due you by myſelf or another; the error being ſince diſcovered, you cannot require the payment; becauſe the pact is void, for want of a debt which may be the foundation of it: *Hactenus conſtitutum valebit, si quod conſtituitur debitum sit*; L. 11, ff. *de conſt. pec.*

Quid, if I promiſed to pay you a ſum which I declared I owed you, although I then knew that I did not owe it? This agreement cannot be valid as a pact *conſtitutæ pecuniæ*, for want of a debt, which ought to be the foundation of it: it contains in this caſe a donation which I wiſhed to make to you; and cannot be valid, if it be not clothed with all the formalities which the municipal law requires for the validity of donations.

7. When the debt of which payment has been promiſed by the pact *conſtitutæ pecuniæ*, was ſuſpended by a condition under which it was contracted, and which was not yet performed; although there was then as yet no debt, yet if afterwards the condition be performed, the pact will be valid: for conditions, when they are performed, have a retroſpective effect to the time of the contract: the debt will be preſumed to have exiſted from the time it was contracted, and conſequently at the time of the pact *conſtitutæ pecuniæ*, which intervened ſome time after. L. 19. ff. *d. tit.*

But if the condition is not performed, the pact will not be valid: it necessarily depends on the condition under which the debt was due: although this was not expressed by the parties.

Quid, if I had expressly promised to pay, even if the condition should happen to fail? The promise to pay cannot in this case be valid as a pact *constitutæ pecuniæ*, for want of a debt which is the foundation of it; it contains, in case of the failure of the condition, a donation, which cannot be valid, unless clothed with the formalities required for the validity of donations *inter vivos*.

8. It is immaterial in what manner, what is promised to be paid by the pact *constitutæ pecuniæ* be due: for in whatever manner what I promise to pay you may be due, were it only a mere natural obligation, it is not a donation that I make; it is a payment which I promise to make, and consequently this is a true case of the pact *pecuniæ constitutæ*.

Quid, if the debt was one of those which the municipal law disallows, would the pact *constitutæ pecuniæ*, by which one should promise to pay it, be valid? I think that if the debt was disallowed by the municipal law, not on account of some defective cause from which it proceeded, but on account of some incapacity of the person who contracted it, and this incapacity did not exist at the time of the pact, the pact would be valid.

For example. If a feme-covert has borrowed a sum, which did not turn to her advantage, I think that, on her becoming a widow, she may validly bind herself to pay it. For although such a debt be disallowed by the municipal law, which declares it void, it suffices that it is due in *foro conscientiæ*, that the payment made by this woman may be an actual payment and not a donation. Hence it follows that the agreement, by which she has promised to pay it, does not contain a donation, but a promise to pay and consequently it is a true pact *constitutæ pecuniæ*, which the woman might validly make, since she was then free and able to bind

herſelf. It will be replied that we have ſaid *ſupra*, *n.* 395, that this obligation cannot be the foundation of a ſecuritiſhip; conſequently it cannot be the foundation of a pact *conſtitutae pecuniae.*

I anſwer that there is much difference between the two caſes. A ſecuritiſhip is a mere acceſſion to the obligation of a principal debtor: the obligation of a ſecurity cannot exiſt alone; there muſt neceſſarily be a principal obligation, to which it is an acceſſory. An obligation which the municipal law diſallows, and which it declares abſolutely null, is not ſuſceptible of acceſſories, and cannot conſequently be the ſubject of a contract of ſecuritiſhip. The right which I acquire againſt you, when you become a ſecurity to me for another, is only an extenſion of the right which I had againſt the perſon for whom you become a ſecurity. If I have none againſt him, the law declaring his obligation abſolutely null, I cannot have any againſt you. It is not ſo with regard to the pact *conſtitutae pecuniae.* If it be ſaid that the obligation which reſults from it is *accessory* to the principal obligation, which one promiſes by this pact to diſcharge, this is only ſaid in this ſenſe, that it is added to this principal obligation, but it is not ſaid in the ſame ſenſe as it is ſaid in the caſe of a ſecuritiſhip. This is not an obligation, like a ſecuritiſhip, which is a ſimple acceſſion to the principal obligation: it is an obligation which exiſts by itſelf, *propriis viribus*, and even in ſome caſes, after the principal obligation has ceaſed to exiſt, as ſhall be ſhewn *infra*, by the law 18, §. 1, ff. *d. tit.*

If it is of the eſſence of the pact *conſtitutae pecuniae* that there be a pre-exiſting debt, it is only becauſe it ought to have for its object a payment; otherwiſe it would include a donation. In order that this pact may not contain a donation, and that it may have for its object a payment, *it* ſuffices that the debt which one promiſes to pay by this pact be due, at leaſt in *foro conſcientiae*, and that there be conſequently a juſt cauſe to pay it; although in *foro legis*, it be declared null by the municipal law.

9. Obſerve, nevertheleſs, that for the validity of the pact *constitutæ pecuniæ*, by which one promiſes to pay one of thoſe debts which are diſallowed and annulled by the municipal law, it is neceſſary that the debt be not diſallowed on account of ſome defect in the cauſe from which it reſults, but only on account of ſome civil incapacity of the perſon who contracted it, and it is requiſite that this perſon be under no incapacity at the time of the pact by which he promiſes to pay; ſuch as in the caſe of which we have given an example. But if the debt, which one promiſed to pay by the pact *constitutæ pecuniæ*, be a debt which the municipal law diſallows on account of ſome defect in the cauſe from which it reſults; *puta*, if it be due for the expences incurred in a tavern by an inhabitant of the place; although ſuch a debt be due in *foro conscientiæ*, and the payment of it would be valid, yet the pact, by which one ſhould promiſe to the tavern-keeper to pay it, would not be valid, and he would not be admitted to ſue for it. The reaſon is that the defect in the cauſe of the debt ſtill exiſts, whether the tavern-keeper claims the payment of it by virtue of the firſt obligation contracted by him who originally incurred the debt in the tavern, or by virtue of the pact *constitutæ pecuniæ*; it is always a tavern debt, which the judge cannot admit.

10. When the debt is due only *subtilitate juris*, as that which would reſult from a promiſe extorted by fraud or violence, for which I am neither bound in *foro legis*, where I may oppoſe the plea reſulting from the fraud or violence, nor in *foro conscientiæ*, it cannot be the foundation of a pact *constitutæ pecuniæ*. *Si quis constituerit quod jure civili debebat, jure prætorio non debebat, id est, per exceptionem, an constituendo te teatur? Et est verum non teneri, quia debita juribus non est pecunia quæ constituta est*; L. 3, §. 1, ff. *pec. const. Juribus; id est, nec jure naturali, nec quoad effectum jure civili, propter exceptionem.*

The reaſon is that as it is of the eſſence of the pact *constitutæ pecuniæ*, that it have for its object the payment of

a debt, such a debt as that a valid payment of it cannot be made, cannot serve as a foundation to this pact, for either the payment has been made by mistake, and it is not valid since there is ground to reclaim what is paid, L. 26, §. 3, ff. *de Cond. ind.*; or the payment is made, with knowledge of the defect in the debt, and in this case it is rather a donation than a payment; according to the rule, *Cujus per errorem dati conditio est, ejus per errorem dati donatio est*, L. 58, ff. *de R. J.* A donation cannot be the object of a pact *constitutae pecuniae*; nothing can be, but the payment of a debt.

11. It is indeed necessary, as we have seen thus far, in order that the pact *constitutae pecuniae* be valid, that at the time of this pact, there exist a debt which one promises by this pact to pay. But the existence of the thing which is promised, by the pact, to be paid, is not in the same manner always necessary. For if this thing had perished by the act or fault of him who was debtor of it, or since he was put in arrear, the thing will continue in this case to be due, although it had ceased to exist, as we shall see *infra*, *part* 3, *chap.* 6, *art.* 3, which suffices that the pact *constitutae pecuniae*, by which this thing is promised to be paid, though it has ceased to exist, may be valid, and bind him who made the promise to pay the price of this thing. This is the decision of Julian: *Promissor hominis, homine mortuo quum per eum staret quominus traderetur, si hominem daturum se constituerit, de constituta pecunia tenebitur ut pretium ejus solvat*; L. 23, ff. *d. tit.*

12. Provided that at the time of the pact there exist a debt, the payment of which may be the object of it, it is immaterial to the validity of the pact, whether it be the debtor who promises to pay it, or whether it be another person who promises to pay it for him; *& quod ego debeo, tu constiuendo teneberis.* L. 5, §. 2, *d. tit.*

It is not necessary that the assent of the debtor should intervene, when another binds himself by this pact to pay for him what he owes; one may even make this pact against his will; for as one may pay for another without his con-

ſent and even againſt his will, L. 52, ff. *de solut.*, ſo one may bind himſelf to pay for another without his conſent, and even againſt his will. This is taught by Ulpian: *Utrum praesente debitore an absente constituat quis, parvi refert: Hoc amplius etiam invito.... unde falsam putat opinionem Labeonis existimantis, si postquam quis constituit pro alio, dominus ei denuntiet ne solvat, exceptionem dandam: Nec immerito; nam cum semel sit obligatus qui constituit, factum debitoris non debet eum excusare*; L. 27, ff. *d. tit.*

I may indeed, by the pact *constitutæ pecuniæ*, promiſe to pay what is due by another; but it is neceſſary, in order that the pact may be valid, that I ſhould promiſe to pay it as a thing due by him who is really the debtor of it: if I promiſed to pay it as under a ſuppoſition that I was myſelf the debtor of it, the pact would not be valid, if I were not the debtor; L. 11, ff. *d. tit.*

13. As a payment is valid, not only when it is made to the creditor, but when it is made to another by his order or by his conſent; ſo this pact is valid, whether it be to the creditor himſelf that one promiſes to pay or whether it be to another, provided it be with his conſent. It is thus we ought to underſtand what Ulpian ſays: *Quod constituitur, in rem exactum est, non utique ut is cui constituitur creditor sit; nam quod tibi debetur, si mihi constituatur, debetur*; L. 5, §. 2; provided, as we have ſaid, that this be with the conſent of the creditor. But if one promiſed to pay to another than the creditor without his conſent, the pact would not be valid, although this ſhould be to him to whom one could validly pay. *Titio stipuler; Titio constitui suo nomine.* This is taught by Ulpian. *Si mihi aut non posse Julianus ait; quia non habet petitionem, tametsi ei solvi possit*; L. 7, §. 1, ff. *d. tit.*

§. II.

Whether the pact conſtitutæ pecuniæ *necessarily includes a time in which one promises to pay.*

14. Among the Romans, as we have already obſerved, the pact *constitutæ pecuniæ* ordinarily contained a certain day or

time within which payment was promiſed. The word *conſtitutum* appeared ſo much to include the idea of a time, that it had been doubted whether the pact *conſtitutæ pecuniæ* might be valid, when there was no time expreſſed. This we learn from Ulpian, who thinks nevertheleſs that the pact in this caſe is no leſs valid, but that a delay of eight days at leaſt ought to be implied. L. 21, §. 1, ff. *d. tit.*

This deciſion ought not, I think, to be admitted, except when the parties had not been more explicit as to the time of payment in the contract by which the debt was created, than in the pact *conſtitutæ pecuniæ* by which one has bound himſelf to pay it. But if the contract mentioned the time within which it is to be paid, I think that the parties, who mentioned nothing as to this in the pact *conſtitutae pecuniæ*, ought to be preſumed to have reſted ſatisfied with the time mentioned in the contract.

This principle of the Roman law, that the pact *conſtitutæ pecuniæ* muſt always include a time expreſſed or implied, within which ought to be made the payment which by this pact is promiſed to be made, is not received among us, according to what we have obſerved in the beginning of this ſection.

§. III.

Whether one may by the pact conſtitutæ pecuniæ *bind one's ſelf for more than is due, or to another thing than what is due, or bind one's ſelf thereto in a different manner.*

15. It is not neceſſary to the validity of the pact *conſtitutæ pecuniæ*, that one ſhould promiſe by this pact to pay preciſely the ſame ſum as that which is due; it may be a leſs ſum: *Si quis viginti debens, decem conſtituit ſe ſoluturum, tenebitur*, L. 13, ff. *de. pec. conſt.* Note that in this caſe, although the debtor be not liable *ex pacto conſtitutæ pecuniæ* but in *decem*, he ſtill remains debtor of the whole ſum *ex priſtina obligatione*, as the pact *conſtitutæ pecuniæ* does not deſtroy the firſt obligation, but only accedes to it.

16. One may validly promiſe by the pact *conſtitutæ pecuniæ* to pay a leſs ſum than the one that is due; but one

cannot validly promiſe to pay a greater ſum; and if this be promiſed the pact will be valid only to the amount of the ſum due. *V. G. Si quis centum aureos debens, ducentos conſtituat, in centum tantummodo tenetur;* L. 11. ff. *d. tit.*

The reaſon is that what ſhould be given above the ſum due, would not be a payment, but a donation, and, as we have already ſaid ſeveral times, the pact *conſtitutæ pecuniæ* can be valid only as a promiſe to pay, and not as a donation.

For the ſame reaſon, if one had promiſed by this pact to pay ſomething elſe beſides the thing which he owes, the pact would be valid only for that ſum; *Si decem debeantur, & decem & Stichum conſtituat, potest dici decem tantummodo nomine teneri;* L. 12.

It is not however neceſſary to the validity of the pact *conſtitutae pecuniae* that one ſhould bind himſelf preciſely to pay the ſame thing which is due. One may validly promiſe to pay another thing, not beſides that which is due, but in its ſtead. For the payment which is made of another thing, in the room of that which is due being valid, when the creditor conſents to it, as we ſhall ſee *infra, part* 3, *n.* 495, the agreement to paying another thing than that which is due, ought likewiſe to be valid. This is taught by Ulpian: *An potest conſtitui aliud quam quod debetur quæsitum est? Sed cum jam placet rem pro re solvi posse, nihil prohibet & aliud pro debito conſtitui;* L. 1, §. 5, ff. *d. tit.*

17. The pact to pay another thing than that which is due may be made validly, not only by the debtor but by a third perſon who promiſes to pay this other thing for the debtor. For as a third perſon may validly pay for a debtor another thing in lieu of that which is due, when the creditor conſents to it, he may alſo validly promiſe by this pact to make this payment.

In this the pact differs from the ſecuritiſhip, for as we have ſeen *supra, n.* 568, a ſecurity cannot validly bind himſelf for another thing than that which is due by the principal debtor. In *aliam rem quam quæ credita est, fidejussor*

obligari non potest; L. 42, ff. *de fidej.* The reaſon of this difference is that a ſecuritiſhip is only a ſimple adherence of the ſecurity to the obligation of the principal debtor: it cannot then have a different object. On the contrary, the pact *constitutæ pecuniæ* ſuppoſes indeed the pre-exiſtence of a debt, having for its object the payment of that debt; but it is not on this account a ſimple adherence to the principal obligation; it may have a different object from that of the principal obligation. For, as the payment of this principal debt, which is the object of the pact, may be made, with the conſent of the creditor, in any other thing than that which is due, one may promiſe by this pact to pay another thing than that which is due; in which caſe, the pact has another object than the principal obligation. Another proof that the pact *constitutæ pecuniæ* is not a ſimple adherence to the principal obligation, is that the obligation, which reſults from this pact, exiſts ſometimes after the principal obligation is extinguiſhed, as we ſhall ſee in the next paragraph.

18. One may bind himſelf, by this pact, in a different manner from the principal obligation. For example. One may bind himſelf, by this pact, to pay in another place than that expreſſed in the principal obligation: *Eum qui Ephesi promisit se soluturum, si constituit alio loco, teneri constat*; L. 5, ff. *de pec. cons.*

One may even bind himſelf by this pact to pay in a ſhorter time than that mentioned in the principal obligation: *sed & si citeriore die constituat se soluturum, similiter tenetur*; L. 4, ff. *d. tit.*

The pact by which one promiſes to pay within a ſhorter time, is valid whether it be interpoſed by the debtor or whether it be interpoſed by a third perſon who promiſes to pay for him, as Accurſus has well remarked in his gloſs on this law.

This is not contrary to the principle which we have cited *supra*, n. 370: *Illud commune est in universis qui pro aliis obligantur, quod si fuerint in duriorem causam adhibiti, placuit eos omnino non obligari*; L. 8, §. 7, ff. *de fidej.* For this

principle applies to those only whose obligation is but a mere adherence to that of the principal debtor, such as securities. But the obligation which is contracted by the pact *constituta pecuniæ*, although it ought to have for object the payment of a pre-existing obligation, is not, as we have already remarked a mere adherence to this obligation; since as we have already seen, one may bind himself by this pact to give another thing than that which is due, provided it be in payment and in lieu of that which is due, that one promises to give it. Likewise provided the pact have no other object than the payment of the debt, one may, by this pact bind himself on harder terms to make the payment than the creditor was bound to by the principal obligation and consequently to do it within a shorter time. Accursus observes very well on this law that he who binds himself by this pact and whom he calls *reus constitutae pecuniae*, differs in this from the security.

I cannot approve of the opinion of Cujas who in his commentary on Paulus *ad. Ed.* on this law, blames Accursus for distinguishing the *reus pecuniae constitutae* from the security and who contends that the security may, like the *reus consitutae pecuniae*, bind himself to pay within a shorter time than the principal debtor is bound to pay in, and that it will not be found in any law that he cannot. I answer, that it suffices that the law should say generally that securities may not bind themselves *in duriorem causam*, for it to be concluded that they may not bind themselves to pay within a shorter time than that in which the principal debtor is bound to pay; for it is clear that the condition of him who is bound to pay *hic & nunc* and without delay, is harder than that of him who has a day of payment, and it is true to say that he is bound to more, since more is to be considered *non solum quantitate sed Die, conditione, loco, &c.* Further, the law 16, f. 5, ff. *de fidej.* decides expressly that if one has become a security under a certain condition for a principal debtor, who was bound to pay at the end of a certain time, and the condition is accomplished before the time, the security will not be bound. Is not this saying very ex-

preſsly that a ſecurity cannot be bound to pay immediately, when the principal debtor has a day of payment?

19. The law 8, ff. *de pec. const.* furniſhes another example of the principle that one may bind himſelf differently and on harder terms by the pact *conſtitutae pecuniae*, than by the principal obligation. It decides that I may validly agree by this pact that that which by the principal obligation might have been paid either to me or into the hands of another perſon, ſhall be paid to me alone. The condition of the ſecurity who ſhould be deprived of the convenience which the debtor has of paying into the hands of a third perſon, would be harder than that of the principal debtor. L. 34, ff. *de fidej*,

Cujas, in the ſame work, *ad. leg.* 10 & 13, ſays that this law ought to be reſtricted to its particular caſe which is when it is the debtor himſelf who promiſes to pay to me, alone, what was payable to me, or into the hands of a third perſon; and that a third perſon could not make ſuch a pact, for he cannot any more than a ſecurity bind himſelf *in duriorem causam*. I think on the contrary that as this pact is not a mere adherence to the principal obligation, a third perſon may by it bind himſelf *in duriorem causam*, as we have ſeen above.

20. It remains for us to obſerve that in new titles, which heirs give and by which they bind themſelves to the payment of what was due by the anceſtor, they may indeed, according to the principles which we have given, bind themſelves to pay under different clauſes than thoſe mentioned in the primitive title. But, for this purpoſe they ought to declare that they mean to alter the primitive title: otherwiſe all that is found in the new title, different from the primitive title, is preſumed to have crept in through error, and is not valid; the preſumption being that thoſe who give ſuch titles, intend to acknowledge and confirm, what is mentioned in the primitive title and not to change any thing therein.

§. IV.

Of the effect of the pact conſtitutæ pecuniæ, *and of the obligation which results from it.*

First principle.

21. The pact *conſtitutæ pecuniæ* which has for its object the payment of a pre-exiſting obligation contains no novation. It produces a new obligation which does not extinguiſh the firſt but accedes to it.

Second principle.

Although the pact *conſtitutæ pecuniæ* does not extinguiſh the firſt obligation; it ſometimes occaſions changes and modifications in it, which, however, according to the ſubtilty of the principles of the civil law, was not done *ipso jure*, but *per exceptionem*.

Third principle.

Although the obligation, which reſults from the pact *conſtitutæ pecuniæ*, accedes to the firſt, it is not however a mere adherence to the firſt obligation, it exiſts of itſelf, and it ſometimes indeed continues to exiſt after the extinction of the firſt.

Fourth principle.

The payment of either of theſe obligations extinguiſhes and diſcharges both.

22. The firſt of theſe principles requires no illuſtration.

The ſecond will be illuſtrated by examples.

First example.

We have ſeen in the preceding article that one might, by the pact *conſtitutæ pecuniæ*, promiſe to pay in lieu of the ſum or thing which is due another thing or ſum. Let us ſuppoſe that my debtor of thirty piſtoles promiſes to pay me at All-Saints, ſix barrels of wine from his vintage, in payment of the ſum of thirty piſtoles which he owes me. This pact does not deſtroy the firſt obligation. I may by virtue of the firſt obligation demand from my debtor the thirty piſtoles, and my ſuit proceeds *ipso jure*; but as by the pact

I have agreed that he might pay me instead of this sum six barrels of wine, he may, by pleading the pact and tendering the six barrels of wine, require to be discharged from my demand of thirty pistoles. By means of this plea, of which he may avail himself, his first obligation, which was an absolute obligation to pay me precisely thirty pistoles, receives a modification from the pact, and becomes an obligation of thirty pistoles, which may be discharged by the delivery of six barrels of wine in lieu of it.

The creditor, being creditor of the thirty pistoles, by virtue of the first obligation and creditor of the six barrels of wine, by virtue of that which results from the pact *constitutae pecuniae*, may, if he sees fit, bring the action which results from the pact and demand the six barrels of wine; but if the debtor choose to pay the thirty pistoles, he might in tendering them, procure himself to be discharged from the demand for the six barrels of wine, because according to our fourth principle, the payment of the thirty pistoles, which discharges the first obligation, discharges them both.

Second example.

83. If being debtor to you of a sum which was payable to you alone, at your house, I promise to you, by the pact *constitutae pecuniae*, to pay into your hands, or into those of your correspondent, at a less distant place; this pact brings in my favour a modification to my obligation, in this, that whereas before the pact, I was bound to put into your hands and at your house, I acquire by this pact the convenience of paying it into the hands of your correspondent and in a place which is more convenient to me; this is done however, according to the subtilty of the civil law, only *per exceptionem*. Si pecunia constituta non sit Titio; *existimo*, etiamsi *actione*, *pecuniae Titio non debitae agi non possit*, *etiamsi Titio solverit*, *tamen per exceptionem adjuvatur*; L. 20. ff. de pec. const. *Priori*; Cujas has substituted this word to the word *propria*, which has no meaning. By this correction, the sense of this text is clear. Although the debtor who has paid into the hands of Titius, remains al-

ways, *stricto jure*, debtor of the first obligation, which is payable only into the hands of the creditor, yet this payment discharges him *per exceptionem doli ex pacti*; because he may plead to the demand of the creditor that this payment was made in consequence of the permission which was granted by the pact.

Third example.

24. When by the pact *constitutæ pecuniæ* my debtor has promised to pay me in a certain time the sum which he owed without a time, or with a shorter time, this pact brings a modification to his first obligation, and renders it payable at the time expressed in this pact: for I am presumed to have granted him by this pact the time in which he has promised to pay me; which must prevent my being received to demand it sooner, even by the action which arises from the first obligation.

It would be otherwise, if it were a third person who had promised me to pay for you in a certain time, what you owed me without a time or with a shorter time. This pact would make no change in your obligation and would not prevent my demanding from you, before the time expressed in this pact, what you owe me: for it is not to you that I have granted the time expressed in this pact, to which you were not a party.

25. There are however some cases in which you may profit indirectly by the pact by which a third person has promised to pay for you: such is the case in which a third person may have promised to pay for you a certain sum instead of the thing which you owed. You acquire indirectly by this pact the convenience of discharging yourself from your obligation by the payment of this sum. For as all persons have power to make, in the name of the debtor, payment of what is due by another, when they have an interest to make this payment, it suffices that you have an interest in the payment of the sum which the third person bound himself by the pact *constitutæ pecuniæ*, to pay in-

stead of the thing which you owe, in order that you may be admitted to make, in the name of this third person, the payment of this sum, and on paying it for this third person and discharging him from his obligation, you likewise discharge yourself from yours: for according to the fourth of our principles, the payment of one of the obligations extinguishes both.

For the same reason, if a third person has promised by this pact to pay in another place than that in which the debtor was bound to pay or if he has promised to pay to the creditor or into the hands of a third person what the debtor could only pay into the hands of the creditor: the debtor may indirectly avail himself of this pact, by making, in the name of this third person, the payment in the place in which he is permitted by the pact *constitutæ pecuniæ* to do it, and into the hands of the person to whom he is permitted to pay, and on making this payment for this third person you discharge yourself from your obligation by which you were bound to pay precisely into the hands of the creditor, or in another place: for, according to the fourth of our principles, the payment of the obligation which results from the pact *constitutæ pecuniæ* extinguishes the first, and *vice versa*.

26. We have related several examples of changes and modifications which the first obligation might receive from the pact *constitutæ pecuniæ* in favor of the debtor: it may receive others in favor of the creditor.

Here is an example. When he who was my debtor of a sum payable to me, or into the hands of another person, promises me by the pact *constitutæ pecuniæ* to pay it to me alone; the first obligation receives by this pact a change in favor of the creditor. For whereas it was before an obligation with the liberty of paying into the hands of a third person, it becomes by this pact an obligation payable only to myself. *Si (mihi aut Titio dare obligatus) postea quam soli mihi te soluturum constituisti, solveris Titio, nihilominus mihi teneberis.* L. 8, ff. *de const. pec.* For by this pact you are

presumed to have renounced the liberty which you had reserved by the first obligation to pay to Titius; therefore the payment you made to him is not valid.

It would be otherwise if it were a third person who had promised to make this payment for you. For this pact to which you were not a party, cannot deprive you of the liberty you had to pay into the hands of Titius.

27. Here is a case in which the pact *constitutæ pecuniæ* makes a change in the first obligation as well on the part of the creditor as on that of the debtor. It is when he who was debtor to me of two things under an alternative, promises to pay me one of them determinately. This pact makes in regard to the creditor a change in the first obligation, in this, that from being alternative as it was, this pact, which determines it to the thing which the debtor has promised to pay, gives the creditor the right to exact this thing determinately, without the debtor's having afterwards the choice to pay the other. This is taught by Papinian: *Illud aut illud debuit, & constituit alterum; an vel alterum quod non constituit, solvere possit quæsitum est? Dixi, non esse audiendum, si velit hodie fidem constitutæ rei frangere*; L. 25, ff. *d. tit.*

The first obligation receives also a change in regard to the debtor; for being by this pact determined to the single thing which the debtor has promised to pay, the debtor may acquire the discharge of his obligation by the extinction of this thing, happening without his fault before his arrear; whereas before this pact, his obligation could not have been extinguished but by the extinction of the two things.

28. Our third principle, that the obligation which arises from the pact *constitutæ pecuniæ*, is not a mere adherence to the first, results sufficiently from what we have said in the preceding articles; and it might have a different object, as when one promises by this pact to pay another thing in the place of that which is due by the first obligation.

This results also from this that it may be contracted under harder conditions; as when one promises to pay in a shorter time than that expressed in the first obligation; *supra, n.* 18.

What proves more fully that the obligation which arises from the pact, is not a simple adherence to the first obligation which one has bound himself by this pact to discharge, and that it exists by itself, is that it may continue to exist after the extinction of this first obligation.

This is taught by Ulpian: *Si quid debitum tunc fuit quum constitueretur, nunc non sit, nihilominus tenet constitutum; quia retrorsum se actio refert: proinde temporali actione obligatum, constituendo Celsus & Julianus teneri debere, licet post constitutum dies temporalis actionis exierit. Quare etsi post tempus obligationis se soluturum constituit, adhuc idem Julianus putat, quoniam eo tempore constituit quo erat obligatio, licet in id tempus quo non tenebatur;* L. 18, §. 1, ff. *de pec. const.*

The commentary adduces as an example of this decision, the case in which a vendor, by a pact *constitutæ pecuniæ*, should have promised the purchaser to pay him a certain sum as an indemnification for a defect in the thing sold for which he was liable to him *actione æstimatoria.* According to the decision in this law, the obligation which results from this pact to pay this sum, continues even after the lapse of the six months to which the action *æstimatoria* was limited; and one might by the pact even have given for the payment of the sum a day beyond the six months of duration of the action *æstimatoria.*

In the example adduced in the commentary, it may be said that although the action *æstimatoria* be extinguished by the expiration of the six months, there remains nevertheless after this time a natural obligation to indemnify the buyer, which may be the subject of the payment, which the latter promised to make by the pact *constitutæ pecuniæ.*

Quid, if the debt for the payment of which the pact *constitutæ pecuniæ* has intervened and which existed at the time of this pact, has since been extinguished otherwise

than by an actual or fictitious payment, so that there remains no obligation natural or civil? Will the obligation contracted by the pact *constitutæ pecuniæ* for the payment of this debt continue to exist? Yes. Such is the decision of Paul in the law 49, §. 2, ff. *de pec. const.* where he says that if a father debtor towards the creditor of his son, of the sum which was then in the *peculium* of his son, has promised by this pact to the creditor to pay him this sum, he continues to owe it by virtue of this pact, although the obligation *de peculio* for which he was liable, and in payment of which he promised to pay this sum, be extinguished, if there be nothing remaining of the *peculium* of his son. *Licet interierit peculium, non tamen liberatur.*

We will add further examples more conformable to our usages. *Finge.* I became a security to you for Peter, for the sum of one thousand livres which he owed you, on condition that my securityship should continue only two years, at the end of which I should be exonerated. Before the expiration of the two years and consequently whilst my securityship continued, James promised you to pay you this sum for me, and he assigned to you a time of payment which does not happen till after the two years. Will James, after the end of the two years, be bound by the pact *constitutæ pecuniæ* to pay you? The reason to doubt is that having bound myself only on condition that my securityship should continue but two years, and that I should be discharged from it after that time, there exists no debt due from me naturally or civilly that may be the subject of the payment which he promised to make for me. The reason to decide that the obligation of James still continues to exist, notwithstanding the extinction of my debt, in payment of which he promised to give you the sum of one thousand livres, is that one ought to judge of the existence of the debt, for the payment of which the pact *constitutæ pecuniæ* has intervened, by the time when this pact intervened. If at the time it intervened I really owed you the sum of one thousand livres, the pact has validly intervened; James has validly con-

tracted the obligation to pay you that ſum. It is not material that my debt has ſince been extinguiſhed; that which he contracted continues: *Si quid debitum tunc fuit quum constitueretur, nunc non ſit, tenet constitutum; QUIA RETRORSUM SE ACTIO REFERT.* It will be objected that he bound himſelf to pay my debt; that he cannot pay it when it is extinguiſhed: that his obligation cannot then any longer exiſt, that it is reduced to ſomething impoſſible. I anſwer that it is indeed in payment of my debt that he bound himſelf to pay you one thouſand livres, and it was neceſſary for this that I ſhould then have owed them to you: but after he has contracted the obligation, the payment he ought to make and which he does make of this ſum, is the payment of his own debt; it is only indirectly that it might be alſo the payment of mine, if it yet exiſted.

Here is another example. A third perſon bound himſelf to pay you three hundred livres for me, in lieu of a horſe which I owed you: although ſince that time, my obligation has been extinguiſhed by the death of the horſe, that of the third perſon muſt continue.

This caſe is very different from that of a perſon who ſhould be debtor of a certain horſe, or of three hundred livres at his choice; in this caſe the death of the horſe diſcharges him entirely from his obligation, becauſe in ſuch caſe nothing is due but the horſe; the three hundred livres are *in facultate ſolutionis.* But in the above caſe the third perſon was actually debtor of the three hundred livres, he was not alſo of the horſe; it was only of the ſum that he was debtor; therefore the death of the horſe which extinguiſhes my obligation, does not extinguiſh his.

29. The obligation that reſults from the pact *conſtitutæ pecuniæ* may well continue after the extinction of the principal obligation for the payment of which the pact has intervened. But it is neceſſary for this, as we have already obſerved, that it ſhould have been extinguiſhed in ſome other manner than by an actual or fictitious payment: for according to the fourth of our principles, the payment of

one of the two obligations, either of the principal obligation, or of that of the pact, extinguishes them both.

30. The reason of the fourth principle is evident. What is promised by the pact *constitutæ pecuniæ* being promised in payment of the principal obligation, this promise, when it is carried into effect by the payment that is made, includes a payment of the principal obligation; the payment then of what is promised by the pact, is a payment of the two obligations, and consequently extinguishes them both.

Vice versâ, the payment of the principal obligation extinguishes that of the pact, in barring the creditor from demanding the payment of it; for what was promised him by the pact having been promised to him, and being due to him, only to pay him the principal obligation, if after having been in another manner paid the principal obligation, he required payment of what has been promised him by the pact *constitutæ pecuniæ*, he would be paid the principal obligation twice, which good faith does not permit. *Bona-fides non patitur ut idem bis exigatur*; L. 57, ff. *de R. J.* one cannot twice require payment of the same debt.

31. This principle that the payment of one of the two obligations extinguishes them both, is true, not only with regard to actual payments, but also with regard to fictitious payments; as a novation, set-off, and even a release. The creditor requiring by the set-off of a like sum which he owed, the discharge of that sum, finds himself, by this discharge, paid that which was due him. The creditor in the case of a novation finds himself paid the debt of which he has made a novation, by the new debt that is contracted to him. He cannot then in such case require to be paid what has been promised to him by the pact *constitutæ pecuniæ*, since it would be to require to be paid twice.

It is the same in case of a release; for though in such case he may not have received any thing, it suffices that by this release he should consider himself paid the principal obligation, that he may no longer be allowed to require to be paid a second time.

32. Our principle that the payment of one of the two obligations extinguiſhes both, applies when what has been promiſed by the pact *constitutae pecuniae* has been promiſed for the payment of all that was due by the principal obligation. When one promiſed to pay but a part, the payment of what was promiſed by the pact extinguiſhes the principal obligation only for that part. For example. If being your debtor for twenty piſtoles, I promiſed or another promiſed to pay fifteen of them within a certain time, the payment of the fifteen piſtoles promiſed by the pact, will extinguiſh the principal obligation only to the amount of the fifteen piſtoles.

33. It remains for us to obſerve, with regard to the obligation *constitutae pecuniae*, that according to the law 16, ff. *de pec. const.* When two perſons have promiſed to pay what is due by a third, they are liable each for the whole. In which they reſemble ſecurities, *supra*, *n.* 415: but they have, like ſecurities, the pleas of diviſion, when they are ſolvent. L. *fin. cod. de pec. const.*

Haloander has thought that thoſe who have promiſed by the pact *constitutæ pecuniæ* what is due by a third perſon, have alſo the plea of diſcuſſion when they are ſued for having failed to pay on the day appointed; and that they are included in the diſpoſition of the novel 4, *chap.* 1, under the words *constitutæ pecuniæ reus.*

§. V.

Of the kind of pact, by which one promises to the creditor to give him certain sureties.

34. There is a kind of pact *constitutæ pecuniæ* when one promiſes to the creditor, not to pay him, but to give him within a certain time certain ſureties, as pledges, hypothecation, ſecurities: *si quis constituerit se pignus daturum, debet hoc constitutum admitti*; L. 14, §. 1, ff. *de pec. const.*

The effect of this pact is that he who promiſed by this pact to give certain ſureties may, on his failing to give them be compelled to pay the debt, even before the time when

it is payable, and if it be an annuity he may be compelled to reimburſe the principal.

35. He who has promiſed by this pact to give for a ſecurity a certain perſon, is diſcharged from his obligation, if, before he has performed it, or has been put in arrear to perform it, the perſon whom he promiſed to give for a ſecurity happens to die; *d.* L. 14, §. 2. The reaſon is that his obligation becomes impoſſible by the death of this perſon who cannot now become a ſecurity.

It would be otherwiſe, if the perſon whom he promiſed to give for a ſecurity, refuſed to be bound as his ſecurity: *si nolit fidejubere, puto teneri eum qui constituit, nisi aliud actum est*; *d.* §. The reaſon is that in order that my obligation may be valid, it ſuffices that the ſecuritiſhip of the perſon whom I promiſed to give for a ſecurity, be ſomething poſſible in itſelf, though it be not poſſible to me on account of the refuſal of this perſon to enter into the ſecuritiſhip. It is my own fault to have promiſed what I could not perform. This is conformable to the principles eſtabliſhed *supra*, *n.* 136.

END OF THE FIRST VOLUME.

A

TREATISE

ON

OBLIGATIONS,

CONSIDERED IN A

MORAL AND *LEGAL* VIEW.

Translated from the French of POTHIER.

IN TWO VOLUMES.

VOLUME THE SECOND.

NEWBERN, N. C.

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A

TREATISE

ON

OBLIGATIONS.

THIRD PART.

Of the manner in which obligations are extinguiſhed and of the different pleas and preſcriptions againſt them.

457. OBLIGATIONS may be extinguiſhed in different ways; by actual payment, by conſignation, by ſet-off, by confuſion, by novation, by releaſe, by extinction of the thing due.

Thoſe which have been contracted under ſome reſolutive condition, are extinguiſhed by the happening of this condition; others by the death of the debtor or that of the creditor.

We ſhall treat of theſe different ways ſeparately in ſeven chapters. We ſhall add an eighth, in which we ſhall treat of pleas and preſcriptions.

CHAPTER THE FIRST.

Of actual payment, and of consignation.

458. ACTUAL payment is the actual performance of what one has obliged himself to give or to do.

When the obligation is to do something, the actual payment of this obligation consists in doing the thing which one has bound himself to do.

When the obligation is to give something, payment is the donation and translation of the property of this thing.

It is evident that he who has performed his obligation is acquitted and discharged: hence it follows that actual payment, which is nothing else but the performance of the obligation, is the most natural way in which obligations may be extinguished.

We shall see in the two first articles of this chapter by whom and to whom payment ought to be made; in the third what ought to be paid, how, and in what condition; in the fourth and fifth, when payment ought to be made, where and at whose expence. We shall treat in the sixth of the effect of payments. The seventh will contain the rules of their application. Lastly, in the eighth we shall treat of consignation and tender.

ARTICLE THE FIRST.

By whom payment ought to be made.

459. When the obligation is to give something, the payment consisting as we have said in the giving or transferring of the property of the thing, it follows thence that, in order that the payment may be valid, it should be by a person capable of transferring the property of the thing paid.

From this it follows that the payment is not valid if it be not made by the owner of the thing or by his consent; for otherwise he who pays cannot transfer to the creditor to whom he makes the payment, the property of the thing.

Nemo plus juris in alium transferre potest quam ipse habet; L. 54, ff. *de reg. juris.*

According to this principle, although the debt of a deceaſed perſon were of a thing determinately due, one of the heirs of the deceaſed who pays this thing to the creditor without the conſent of his co-heirs, does not validly pay it except for his own part, in ſtrictneſs of law, not being owner of the other parts, which belong to his co-heirs; but as to the effect, this payment is valid unleſs the thing were due under the alternative of another thing, or with liberty to pay another thing in its ſtead; otherwiſe the co-heirs are bound to ratify this payment, which they would be obliged to make themſelves if it were not made. *Quod utiliter gestum est, necesse est apud judicem pro rato haberi.* L. 9, ff. *de neg. gest.* *Molin. Tract. de Div. & ind. part* 2, *n.* 166 & 169. If the debt did not not conſiſt in *dando*, but in the ſimple reſtitution of a thing of which the deceaſed had only a naked poſſeſſion, *puta*, if it had been lent or depoſited; the reſtitution which one of the heirs, having the thing, ſhould make of it, would be a valid payment even *ipso jure*, without the conſent of the other heirs: for theſe co-heirs having no right in the thing, nor any intereſt in preventing the reſtitution, their conſent is not requiſite. *Molin, ibid.*

460. As the payment is not valid when he who has paid the thing was not the owner of it, ſo it is not valid if, although the owner of it, he were, on account of ſome perſonal defect, incapable of aliening it.

For this reaſon, payment is not valid when it is made by a feme covert unauthoriſed, a minor, or a perſon interdicted. L. 14, §. *fin.* ff. *de solut.*

461. When the payment made by a perſon who was not the owner, or who was incapable of aliening, is of a ſum of money or other thing which is conſumed in the uſe, the conſumption which is made of it, *bona fide*, by the creditor, renders the payment of it valid; *d.* §. The reaſon is, that the uſe which he makes *bona fide* of the ſum of money or other like thing which has been paid to him, is equiva-

lent to the tranſlation of the property of it. Indeed the tranſlation of the property would not have given any thing more to the creditor; he has uſed and conſumed the thing as if the property had been transferred. He is no longer liable to have the ſum of money or other thing which he has conſumed *bona fide*, recalled, any more than if he had been the actual owner of it; ſince the thing which is out of his poſſeſſion, without any fault on his part, can no longer be demanded from him, as the demand can only be made againſt the poſſeſſor of the thing, or him who has wrongfully parted with the poſſeſſion.

462. Although the payment of a thing, the property of which has not been transferred to the creditor, be not valid, yet while he has it in his hands, he is not to be admitted to demand from the debtor what is due him; it is neceſſary that the thing ſhould have been recovered from him, or that he ſhould offer to reſtore it to the debtor. L. 94, ff. *de solut.*

463. In order that the payment may be valid, it is not neceſſary that it ſhould be made by the debtor, or ſome one who has power from him. Any perſon whatever may make the payment, even without any power from the debtor and even againſt his will, provided it be done in the name and in diſcharge of the debtor, and the perſon who pays be capable of transferring the property of the thing paid, the payment is valid; it operates the extinction of the obligation, and diſcharges the debtor even againſt his will. *Solvere pro invito & ignorante cuique licet, cum sit jure civili constitutum licere etiam ignorantis invitique meliorem conditionem facere. Gaius ad.* L. 53, ff. *de solut.* L. 23, L. 40, ff. *d. tit.* and L. 39, ff. *de neg. gest.*

If the payment were not made in the name of the true debtor, it would not be valid; as if one pays me in his own name a ſum of money, believing himſelf to be the debtor of it, when it is not due from him but from another; this payment extinguiſhes not the obligation of the true debtor, and I am bound to return the ſum to him who has paid it to me through error.

This deciſion applies in ſtrictneſs of law even in the caſe in which you have paid me in your name a ſum of money not due from you, out of the monies and by the order of him who indeed owed it. But if I ſued him for it, he might defend himſelf by bringing you in as a party and praying with you that this ſum which you had improperly paid to me in your own name out of his monies, ſhould remain in my hands as the payment of the debt and that he be conſequently diſcharged therefrom. If you were to ſue me to recover back this ſum which you have paid without owing it, I might avoid your demand by cauſing my debtor to be made a party, who would pray that this ſum, having been furniſhed by him to be paid in his name, ſhould remain with me in diſcharge of his debt.

Although the payment of a ſum or thing due me be not valid when paid by him who did not owe it in his own name, yet if he afterwards becomes debtor of it, the payment is thereby rendered valid, if not *ipso jure*, at leaſt *per exceptionem doli*. L. 25, ff. *de solut.*

454. The principle which we have eſtabliſhed that payment is valid by whomſoever made, if made in the name of the debtor, admits of no difficulty when it is effectually made and is received by the creditor. Whether a ſtranger without power or authority to manage the affairs of the debtor, having no intereſt in the diſcharge of the debt, can compel the creditor to receive the payment which he tenders in the name of the debtor, is a queſtion of more difficulty. The laws which we have quoted do not decide it. They ſay, it is true, that payment made by any perſon whatever in the name of the debtor, diſcharges the debtor; but they leave it undecided whether the creditor may be compelled to receive it. We are to ſeek the ſolution of this queſtion from the law 72, §. 2, ff. *de solut.* It decides that the tender of payment made by any perſon whatever in the name and without the knowledge of the debtor, puts the creditor in arrear. The ordinance of 1673 *tit.* 5, *art.* 3, alſo permits bills of exchange in caſe of proteſt to be diſ-

charged by any perſon whatever. From theſe texts this rule is to be drawn, that the tender made to the creditor by any perſon whatever in the name of the debtor is valid and puts the creditor in arrear when the debtor has an intereſt in the payment; as when the tender is made to ſtop a ſuit already commenced, to ſave intereſt or diſcharge a mortgage. But if the payment procures no advantage to the debtor and has no other effect than to change the creditor, the tender ought not to be regarded. *Molin. Tract. de Usur.* 2, 45. The principle that the payment may be made by any perſon whatever for the debtor, is true with regard to obligations to give. The reaſon is that it is never material to the creditor by whom the thing due is given provided it be effectually given.

As to obligations to do, the rule has not the ſame latitude. It applies when the act which is the object of the obligation is of ſuch a nature that it is immaterial to the creditor by whom it be done. For example. If I have bargained with a vine-dreſſer that he ſhould dreſs an acre of my vines, any other may diſcharge him by doing it for him.

It is not the ſame when, in the obligation to do, the perſonal ſkill and ability of the workman who contracted the obligation is conſidered. The obligation in this caſe cannot be diſcharged by another; L. 31, ff. *de solut.* For example. If I have contracted with a painter to make me a painting, he cannot diſcharge his obligation by cauſing it without my conſent to be done by another.

ARTICLE II.

To whom payment ought to be made.

465. Payment, to be valid, ought to be made to the creditor or to ſome perſon who has power from him, or capacity, to receive it.

§. I.

Of payment made to the creditor.

466. We underſtand by a creditor not only the perſon

with whom the contract was made, but alſo his heirs and general or ſpecial aſſigns.

When the creditor has left ſeveral heirs, each becoming creditor only for the part for which he is heir, payment cannot validly be made to any one of them, of more than this part, unleſs he has power from his co-heirs to receive the whole. He to whom the creditor has transferred his claim, either by ſale, gift or legacy, becomes creditor of it by notifying his title to the debtor or by the voluntary admiſſion of the debtor, and conſequently the payment which is made to him is valid. On the contrary, the former creditor ceaſes to be ſuch, after notice to the debtor or his admiſſion, and the payment afterwards made to him would not be valid.

Likewiſe when by a judgment, the garniſhee has been condemned to pay to the plaintiff what he owes the defendant, and final judgment has been had, the plaintiff ſucceeds by this judgment to the right of the defendant, and payment made to him is valid.

467. A perſon who may juſtly be taken for the creditor, is ſometimes preſumed to be ſuch although another is the real creditor, and payment made to this preſumptive creditor is as valid as if made to the real one. For example. You are in poſſeſſion of a manor which does not belong to you, to the true proprietor of which rent and feudal duties are due. Payment made to you while you are in poſſeſſion, for the arrearages of ſuch rents and duties, is valid, though, not being the proprietor, you are not properly the creditor: and when the true proprietor ſhall appear and the manor be reſtored to him, although he was the true creditor of thoſe rights of the manor which have been paid to you, he will not be admitted to demand them from thoſe who have ſo paid them; the payment which they have made to you has diſcharged them. The reaſon is, that every poſſeſſor being of right reputed and preſumed the proprietor of the thing which he poſſeſſes, while the true proprietor does not appear, the debtors have had juſt

cauſe to believe, ſeeing you in poſſeſſion of the manor, that you were the proprietor of it, and conſequently the creditor of what they have paid you. Their good faith ought to render valid the payment which they have made. It is the fault of the true proprietor who did not ſooner make himſelf known.

For the ſame reaſon payments made to him who is in good and lawful poſſeſſion of an inheritance, by the debtors of this eſtate, are valid, although the inheritance does not of right belong to him; ſaving to the true heir, when he ſhall appear, a right to require an account to be rendered by the poſſeſſor of the inheritance of what he has received.

A fortiori, payments made by the debtors of an eſtate to the beneficiary heir are valid, although afterwards this heir be excluded from the inheritance by a relation who becomes the abſolute heir; for if by means of this excluſion he was not the heir, he was at leaſt an adminiſtrator of the inheritance, which gave him a capacity to receive.

Further, a payment made to an heir who has afterwards procured himſelf to be relieved againſt his acceptance is, not the leſs, valid.

468. In order that the payment made either to the creditor himſelf or thoſe who repreſent him, may be valid, it is neceſſary that the perſon be capable of adminiſtering his own eſtate. Therefore, if the creditor was for example, a minor, under interdict, or a feme covert, the payment which ſhould be made to him would not be valid, and would not procure to the debtor a diſcharge.

Nevertheleſs, if this creditor or his tutor or curator for him, pretending the nullity of the payment, ſhould demand to be paid a ſecond time, and the debtor could prove that this creditor has been benefited by the ſum paid to him and that this benefit ſtill continues at the time of the demand; as if his debts have been thereby diſcharged or his buildings repaired, the creditor ought to be barred from his demand, as contrary to good faith, which does not

permit one to benefit and enrich himself at the expence of another. *Neminem æquum est cum alterius damno locupletari.*

Observe that if the sum has been laid out in the purchase of a thing necessary, although this thing has since perished by chance, before the demand, he is not the less to be presumed at the time of his demand to be benefited thereby; for in the supposition that the thing was necessary, if he had not laid out the sum which was paid him, in the purchase of it, he would have been obliged to lay out another sum which he has in this way preserved. *Hoc ipso quo non est pauperior factus, locupletior est;* L. 47, §. 1. ff. *de sol. t.*

If the sum has been employed in the purchase of things which were not necessary to the creditor, he will be admitted to his demand, if they do not continue to exist; if they do, he will still be admitted to his demand by tendering them to the debtor; *d.* L. 47, *princ.* L. 4, ff. *de except.*

469. The payment which the debtor makes to his creditor to the prejudice of an attachment in his hands by the creditors of his creditor, is a good payment against his creditor, but not against the attaching creditors, who may oblige this debtor to pay a second time if it be adjudged that the attachment is valid, saving to him his recourse against his own creditor to whom he has paid in prejudice of the attachment.

Lastly, altho' a man be under an arrest of his body, his debtors may validly pay him, while there are no attachments in their hands; L. 46, §. 6, ff. *de jur. fisc.* L. 41. ff. *de solut.*

§. III.

Of those who have power from the creditor to receive.

470. Payment made to those who have power from the creditor to receive for him, is presumed to be to the creditor himself, and consequently is as valid as if made to him. L. 180, ff. *de reg. jur. Quod jussu alterius solvitur, pro eo est quasi ipsi solutum esset.*

471. It follows from this rule, I. that it is not material to what perſon the creditor has given power; whether it be to a minor or to a monk profeſſed, the payment is good. The reaſon is, that the payment being preſumed to be made to him who has given the power, he, and not the perſon to whom it was given, ought to be conſidered; it was the fault of the creditor to chooſe him. L. 4, *Cod. de solut.*

472. It follows, II. from this rule, that one may validly pay, not only to him who has power from the creditor himſelf to receive, but alſo to him who has ſuch power from one having capacity to receive for the creditor. For example. If the creditor is a minor or a feme covert, payment made to one who has power from the tutor or huſband is valid. L. 96, ff. *de solut.*

473. It follows, III. from this rule, that payment made to him who has power from the creditor, is no further valid than as if made to the creditor himſelf. Therefore if the creditor is a minor or under interdict, payment made to one who has power from him, is no more valid than if made to the minor or perſon interdicted.

474. Payment made to him who has a power to receive, is valid only when the power continues at the time of payment.

Therefore if a creditor has given power to one to receive what is due to him, during a certain time or during his abſence, payment made to this perſon after the expiration of the time or after the return of the creditor, would not be valid, becauſe the power no longer continued.

Likewiſe, if the creditor has revoked the power which he had given, payment made after the revocation is not valid; but it is neceſſary, for this, that the debtor who has paid ſince the revocation ſhould have had knowledge of the revocation, or that it ſhould have been ſo notified to him, as that he might have had knowledge of it; otherwiſe the payment made, altho' after the revocation, will be valid. L. 12, §. 2; L. 24, §. 3; L. 51, ff. *de solut.*

? The reaſon is, that the error of the debtor who pays after the revocation of the power proceeds rather from the fault of the creditor, who ought to notify the debtor of this revocation, than from that of the debtor, who, ſeeing a power to receive and not imagining any revocation, has had juſt cauſe to pay the perſon who had the power. Therefore it is not juſt that the debtor ſhould ſuffer from this error, and be obliged to pay twice; the creditor who is in fault ought alone to ſuffer.

This caſe is very different from that in which the debtor ſhould pay upon a forged power from the creditor; for in this caſe there would be no fault of the creditor; it is that of the debtor in not having ſufficiently informed himſelf of the validity of the power; therefore ſuch payment is void and does not diſcharge the debtor. L. 34, §. 4, ff. *de ſolut.*

475. The power expires alſo by the death of the creditor who gave it, and ſometimes by a change of condition, as by the marriage of the creditor, being a woman; conſequently payment to him who has this power, is not valid, if made ſince the death or change of condition of the creditor who gave it. L. 108, ff. *de ſolut. arg.* L. 58, §. 1.

But if the death or change of condition of the creditor was not known at the time of the payment, the good faith of the debtor would render the payment valid. L. 32, ff. *d. tit.*

476. The power given by one who has capacity to receive for the creditor, expires when this capacity ceaſes. For example. If the tutor of a minor has given power to one to receive the debts of the minor, payment may not be made after the tutorſhip expires, to the perſon who had the power; becauſe the capacity of him who gave it has ceaſed and payment could no longer be made to him. L. 180, ff. *de Reg. juris.*

477. It remains to be obſerved that it is not material whether the power from the creditor be a ſpecial power, or a general one, *omnium negotiorum.* L. 12 *de ſolut.*

An execution in favor of the creditor in the hands of the officer, is equivalent to a power to receive the debt contained therein, and the discharge which he gives to the debtor is as valid as if given by the creditor.

It is otherwise of an attorney at law to whom I have given power to bring suit against my debtor; this does not include a power to receive the debt. L. 86, ff. *de solut.*

It is a celebrated question whether the power which we give to one to contract for us, as to sell or let a thing, includes that of receiving for us the price. Bartolus maintains the affirmative and is followed by Fachin, II. *contr.* 94. I think the most plausible opinion is that of Wissembach, *ad. tit.* ff. *de solut. n.* 14, who holds that the power to sell does not include that to receive the price, unless there are circumstances which give room to presume it.

The Digest, L. 1, §. 12, *de exerc. act.*, appears to me decisive for this opinion. It is there said that he whose only charge on board of a vessel, is to agree with the passengers for the price of their passage, has no power to receive the money. One could not say more formally that the power to sell or to let, does not include that to receive the price.

But there may be circumstances in which he who has a power to sell, is presumed to have a power to receive the price. For example. If there are in a city certain persons whose trade it is to carry about what they are employed to dispose of, and receive the price from the purchasers; in delivering to one of these persons a thing to be sold, I am presumed to give him also a power to receive the price.

§. III.

Of those to whom the law gives capacity to receive.

478. Payment made to those to whom the law gives capacity to receive in the stead of the creditor, is valid.

The law gives this capacity to tutors to receive what is due to their minors, to the curator of persons under interdict to receive what is due to these persons, to husbands

to receive what is due to their wives who are not separated from them, to truſtees of hoſpitals, pariſh officers, &c. to receive what is due to the ſaid hoſpitals, pariſhes, &c.

Such perſons have capacity to receive not only the revenues of thoſe whom they thus repreſent, but alſo the principal of annuities when the debtors think proper to redeem them, without the intervention of any decree to this effect from the judge, and the debtors who have paid into their hands are fully diſcharged, and no recourſe can be had againſt them, even if theſe perſons to whom they have paid ſhould become inſolvent. The law 25, *Cod. de adm. tut.*, which requires the decree of the judge to protect the debtor, in caſe of the inſolvency of the tutor to whom he has paid, is not received in our juriſprudence.

479. The ſingle reaſon of relationſhip to the creditor, however near, is not a ſufficient capacity to receive what is due to him.

Therefore neither the father has capacity to receive what is due to the ſon who is no longer under his power, nor the ſon to receive what is due to his father, nor the huſband to receive what is due to his wife who is ſeparated from him, much leſs the wife to receive what is due to her huſband. L. 22, ff. *hoc. tit.* L. 11, *Cod. hoc tit.*

§ IV.

Of thoſe to whom the agreement gives capacity to receive.

480. Sometimes in a contract by which a perſon obliges himſelf to pay ſomething to another, a third perſon is indicated, into whoſe hands it is agreed that payment may be made as well as to the creditor; ſuch perſon has by the agreement itſelf a capacity to receive for the creditor; and conſequently the payment which is made to him is as valid as if made to the creditor himſelf. Theſe third perſons to whom it is agreed that the debtor may pay are called by the civilians *adjecti ſolutionis gratia.*

Theſe third perſons are moſt frequently creditors of the creditor who indicates them. For example. You ſell

me an eſtate for the ſum of ten thouſand livres, and it is agreed in the contract that I may pay this ſum in your diſcharge, to a third perſon who is your creditor for the like ſum.

Sometimes alſo, the perſon whom I have indicated to you is a third perſon who is not my creditor, but who is to receive this ſum for me, as my mandatary, or indeed as my donee, if I intended to give it to him. Such are properly *adjecti ſolutionis gratia*, ſpoken of in the civil law.

481. A perſon may be indicated to receive not only the thing itſelf which the debtor owes to his creditor, but ſometimes even a different thing; as if I let you a right of paſture in my woods for your hogs, on condition that you pay me the ſum of thirty livres at my houſe, or deliver a hog of one hundred pounds weight to my overſeer at D—. In this caſe the delivery of the hog made to my overſeer, diſcharges you from the thirty livres which you owe me. L. 34, §. 2, ff. *de ſolut.* L. 141, §. 5, ff. *de Verb. oblig.*

482. The ſum which is mentioned in the contract to be paid to a third perſon, may be leſs than that which the debtor obliges himſelf by his contract to pay to the creditor.

Hence ariſes the queſtion, L. 98, §. 5, ff. *de ſolut.*, whether in this caſe the payment of the leſs ſum to this third perſon diſcharges the debtor from the creditor entirely, or only to the amount of this ſum. We ought on this queſtion to ſeek from the circumſtances what was the intention of the parties; but unleſs the contrary is evident, the preſumption is, that it was the intention of the parties that the payment of the leſs ſum made to the perſon indicated, ſhould diſcharge the debtor to the amount only of this ſum.

483. The indication of a third perſon to whom payment is to be made, may be for a place or time different from that in which the thing is payable to the creditor himſelf. For example. I may agree that you pay a ſum of money to me at my houſe in Orleans, or to my banker

in Paris. Likewiſe, I may agree that you pay a ſum of money either to me at the time of a certain fair or to a certain perſon after the time of the ſaid fair. L. 98, §. 4, 6, ff. *de solut.* *Vice versa*, I may agree that you pay ſuch ſum either to me at the time of the fair or to a certain perſon before the fair. L. 141, §. 6, *de Verb. oblig.*

484. The indication may alſo be made to depend on a condition, although the obligation be abſolute; but if the obligation itſelf depends on a condition, the indication, although made abſolute or under another condition, would neceſſarily depend on the condition upon which the obligation depends; for one cannot make a valid payment to the perſon indicated except of a thing due. and it cannot be due if the condition of the obligation has not happened. L. 141, §. 7, 8, ff. *de Verb. oblig.*

It is not the ſame in regard to the time of payment. As the payment may be validly made before the time, the indication to pay to a third perſon is not neceſſarily confined to the time I have granted to my debtor to pay me; therefore I may, in contracting, permit my debtor to pay a third perſon provided he do it in a month, although I have granted him two months to pay to me *d.* L. 98, §. 4.

485. Payment made to the perſon indicated is valid, not only when it is made by the debtor himſelf to whom the indication is made, but when by any other perſon. L. 59, *vers. & si a filio*, ff. *de solut.*

486. This right which the debtor has to pay the ſum to the perſon indicated as validly as if to the creditor himſelf, is a right which paſſes to the heirs of the debtor. They have this right, although it was omitted to be mentioned in the new title which has been given; for an intention to alter a primitive title by a new one is never preſumed.

437. Regularly it can only be the perſon indicated by the contract to whom payment may validly be made, not his heirs or other perſons who may repreſent him. L. 55, ff. *de Verb. oblig.* L. 81, ff. *de solut.*

Nevertheless when a seller indicates to the buyer in the contract of sale to pay the price to one of his creditors, the payment may be validly made not only to this creditor, but to his heirs or other persons who may succeed to his right. The reason is, that in this indication it is not so much the person indicated, as the quality of creditor which has been considered, on account of the interest which the seller had to be discharged from his debt and that which the buyer had to pay to the creditor in order to be substituted to the rights and securities of this creditor.

488. One can no longer validly pay to the person indicated when he has changed his condition. Therefore if the person indicated in the contract, has since lost his civil capacity, payment to him cannot validly be made. L. 38, *de solut.* Although the creditor might have indicated a person who at the time of the contract had lost his civil capacity. L. 95, §. 6, *dict. tit. Cujac. in Comment. ad Pap. in ad h.* L.

The reason of this difference is, that one may presume that the creditor would not have wished that payment should be made into the hands of this person, if he had foreseen this change. But when at the time of the contract this person was civilly dead and the creditor knew it, the intention of the creditor that payment should be made into his hands, although he had lost his civil capacity, cannot be ambiguous.

The same may be said of a person indicated who should afterwards be interdicted, take a husband or become a bankrupt. In all these cases the debtor can no longer validly pay to such person; the presumption being that such person would not have been indicated if these circumstances had been foreseen.

489. He whom the creditor by the agreement itself has indicated, is very different from him who has only a power of attorney from the creditor to receive. The right of paying to an attorney ceases with the revocation of the power, notified to the debtor, which the creditor may

make when he sees fit. The reason is, that the right of paying to the attorney is founded on the power, which is as revocable as any other; from which it follows that as the power comes to an end by the revocation, the right to pay to the attorney also ceases.

On the contrary, the right to pay to the person indicated by the agreement, having its foundation in the agreement itself, of which it makes a part, and from which one of the parties cannot detract without the consent of the other, the creditor cannot deprive the debtor of the benefit of it, who may, against the will of the creditor, pay into the hands of the person indicated, according to the agreement. L. 12, §. 3, & L. 106, ff. *de solut.*

Nevertheless if the creditor alledges that he has reasons why the payment should not be made into the hands of this person indicated by the contract, and that the debtor can have no interest in paying into his hands rather than to the creditor himself, or to some other person who might be indicated in the place of the one already indicated, it would be on the part of the debtor an ill temper and an unreasonable obstinacy to insist on paying into the hands of the person indicated; an obstinacy which a court ought not to favor.

490. By the civil law, the right to pay to the person indicated by the contract, ceased when in a suit which had intervened, the defendant pleaded to the merits; L. 57, §. 1, ff. *de solut.*; a strictness which ought not to be admitted in our law.

491. There is no doubt that payment made of a part to the creditor himself does not take away the right to pay the remainder to the person indicated. L. 71, ff. *de solut.*

§. V.

In what manner payment made to a person who had neither power nor capacity to receive, may be rendered valid.

492. Payment made to a person who had neither power nor capacity, becomes valid, first, by the ratification

and approbation which the creditor makes afterwards of this payment. L. 12, §. 4, *de solut.* L. 82, *Cod. dict. tit.* L. 24, ff. *de neg. gest.*

Ratifications having a retroactive effect, according to the rule *Ratihabitio mandato comparatur*, *d.* L. 12, §. 4, the payment will be presumed to have been good from the time it was made. Therefore if one becomes a security to me for my debtor with a clause that his securitiship shall continue only to the first of January one thousand seven hundred and fifty, at the end of which time he shall rest acquitted and discharged *pleno jure*; the payment which he made in the course of the year one thousand seven hundred and forty nine to a person who had not power from me, would be valid and he could not recall this sum of money, although I had not ratified the payment till the year one thousand seven hundred and fifty, when he would have ceased to be my debtor, if he had not paid: for by means of the retroactive effect of my ratification the payment is valid from the day it was made, which was while his obligation continued. L. 71, §. 1, ff. *de solut.*

According to the same principle if I owe a thousand livres to Peter and Paul, creditors *in solidum*, and I have paid this sum in the first place to a person who received it for Peter without any power from him, and have paid it a second time to Paul, the validity of the payment made to Paul would depend on the ratification by Peter. The first payment would be valid if Peter ratified it, and that made to Paul would be void as being the payment of a debt discharged. If Peter does not ratify, the first payment would not be valid and that made to Paul would be. L. 58, §. 2, ff. *d. tit.*

493. The second case in which the payment would become valid when made to a person who had not a capacity to receive, is when the sum paid has afterwards come to the benefit of the creditor. L. 28, L. 34, §. 9, ff. *de solut.*, as if it has discharged him from what he owed. L. 66, verbo *sed exceptione*, ff. *d. tit.*

The third case is, when the person, to whom payment has been made, has become the heir of the creditor, or has succeeded to his right by some other title. L. 96, §. 4, ff. *de tit.*

ARTICLE III.

What thing ought to be paid, how and in what condition.

§. I.

May one thing be paid for another.

494. Regularly it is the thing due which ought to be paid, and a debtor cannot oblige his creditor to receive in payment another thing than what he owes him. L. 16, *Cod. de solut.*

We do not follow the novel 4, *cap.* 3, which permits the debtor of a sum of money, who has neither money nor goods from which it may be made, to oblige his creditor to receive in payment lands, according to estimation made thereof, unless the creditor would rather find him a purchaser.

495. Not only the debtor cannot oblige the creditor to receive in payment another thing than what is due to him, but if through error the creditor, thinking he was receiving what was due, had received another thing, the payment would not be valid, and the creditor could, on offering to return what he has received, exact the thing which is due him. Paul, L. 59, ff. *de solut. Si quum aurum tibi promisissem, tibi ignoranti quasi aurum æs solverim, non liberabor.*

If the creditor was willing however to receive another thing instead of what was due, there is no doubt that the payment is valid; L. 17, *Cod. de solut*; unless there was room for relief against the payment in the case of lesion, on account of the minority of the creditor who had imprudently given his consent, or on account of fraud, &c. L. 26, ff. *de lib. leg.*

496. The debtor may sometimes oblige the creditor to receive some other thing in payment, in the room of that which is due, that is to say, when this right has been

granted to him either by the contract, or by some subsequent agreement with the creditor, intervening. L. 57, L. 96, §. 2, ff. *de solut.*

By the civil law this right ceased when in a suit by the creditor the debtor had pleaded to the merits; *d.* L. 57, which I do not think ought to be followed in our law.

497. These agreements to pay something in lieu of what is due, are always presumed to be made in favor of the debtor: thus it is always lawful for the debtor to pay the sum itself which is due, and the creditor cannot exact any other thing.

Therefore if by a marriage settlement, a husband receives a certain sum as a portion, to secure which he subjects certain lands, and it is agreed that after the dissolution of the marriage, the wife shall receive them in payment of her portion, this does not prevent the husband or his heirs from retaining the said lands, on tendering the portion received, of which the restitution is due. L. 45, ff. *de solut.*

By the same reason if I have leased a vineyard for the sum of five hundred livres a year, payable in wine to be made from it, the right to pay in wine is presumed to be given in favor of the lessee, and I cannot oblige him to give me wine, if he offers to pay me in money the five hundred livres, which is the price of his lease.

But if the payment had been made of a thing in the stead of what was due, the thing being consumed, the debtor would not be admitted to recall it on offering to pay the sum which is due; L. 10, L. 24, *Cod. de solut.*

§. II.

Is the creditor bound to receive in parts what is due to him.

498. Although a debt be divisible, while it is yet undivided, the creditor is not obliged to receive in parts what is due to him.

It is upon this principle that Modestin, L. 41, §. 1, ff. *de usur.*, holds that if there is no clause in the contract that

the debtor may pay in parts, the consignation made by him of a part does not stop the interest even for this part. This supposes the principle well established that a creditor is not obliged to receive in parts what is due to him. If he were so obliged, and the consignation of the part tendered were valid, the interest would cease to run; for when a debt is discharged in part, interest runs only upon what remains due. *Cod. de comp.*

What interest, it will be asked, has the creditor to refuse to his debtor the convenience of paying in parts? The answer is that he has an advantage in receiving all at once a gross sum from which he may derive a profit, rather than several small sums at different times which are imperceptibly expended as they are received. Besides it is an inconvenience to the creditor to credit several small sums and to have calculations to make. *Molin. Tract. de div. & ind. part* 2, *n.* 14.

It is not even sufficient for the debtor to tender the whole sum of the principal which he owes when it bears interest; the creditor is not obliged to receive it, if all the interest which is due is not paid at the same time.

499. Where several persons become securities for a debtor, although they have between them the benefit of a division, yet until they are prosecuted by the creditor for the payment, neither can oblige him to receive payment in part.

The reason is, that the debt for which several persons have become securities, is not *pleno jure* divided between them; these securities have only a plea to demand a division when they are sued: but while they are all solvent this plea cannot be received; the debt until this time not being divided, it follows that the creditor cannot be holden to receive a part.

The interpellation made by the security who is not sued, upon the creditor to receive his part unless he will discharge him, is not well founded, however long may be the time for which the security is bound; for it is only against the principal debtor for whom he is a security, and

not against the creditor, that the security has the action *mandati* to procure himself to be discharged from the securitiship.

This interpellation is not well founded, even when the security alledges that the principal debtor and his co-security, although yet solvent, begin to waste their property, and that he ought not to suffer from the negligence of the creditor to pursue them; this security would have no other resource than to pay the whole debt and procure himself to be substituted to the rights and actions of the creditor. *Molin. Tract. de div. et ind. part.* 2, *n.* 54, 55, 56.

Dumoulin, *n.* 57, goes much further. Even when the obligation of the securities would of right be divided between them, as if three persons had become securities for a debtor, each for a third, he thinks even in this case that the security who is not prosecuted for payment, cannot oblige the creditor to receive the payment of his third; because, says he, the obligation of securities ought not indirectly to impair the principal obligation, and make it payable in parts before it be divided.

I think that Dumoulin goes too far. In fact, the security being bound only for a third, ought to have the right to discharge himself by paying this third, which is all he owes; for every debtor may discharge himself by tendering all that he owes. I think even that the principal debtor who could in his own name pay in part, could pay for one of the securities the third part which this security owed. The debtor having an interest to pay for the security, in order to discharge himself from the indemnity which he owes him, the creditor cannot refuse this payment. Dumoulin, *ibid. n.* 50, admits that this is the common opinion of authors, though contrary to his.

500. The rule that the creditor cannot be obliged to receive in parts that which is due, while the debt remains undivided, receives an exception, first, when there is a clause in the contract that the sum shall be divided into a certain number of instalments, *puta*, into two or three, or

when in conſideration of the poverty of the debtor it is ſo ordered by the judge. The creditor is holden in all theſe caſes to conform himſelf to what is preſcribed by the agreement or by the judgment.

When it is not expreſſed what ſum each payment ſhall be, the payments ought to be underſtood to be of equal parts. For example. If I am obliged to pay you ten thouſand crowns in four payments, each payment ſhould be of a fourth of this ſum, neither more nor leſs, excepting that I may make ſeveral payments at once of the half or three parts of the ſum.

When the agreement is that the payment ſhall be made in two different places, which are united by a conjunctive, as if it be ſaid that I ſhall pay at Orleans at my houſe, and at Paris at the houſe of my banker; by this clauſe it is intended that the payment be by moiety in each of the ſaid places. *Secus*, if the particle is disjunctive; as if it be ſaid that I ſhall pay at Paris *or* at Orleans; the creditor is holden to receive the payment in either of the ſaid places which the debtor may chooſe.

501. Secondly, when there is a conteſt reſpecting the quantity of what is due. As if by an account ſtated, I acknowledge myſelf debtor of a certain balance and my creditor pretends that it ſhould be a greater ſum than is ſtated, by the Digeſt, *l.* 31, *de rel. cred.*, the creditor may be obliged to receive the ſum which I acknowledge to be due, ſaving his right to more, if due, on the deciſion of the ſuit. This being very equitable, it is prudent in the judge to order this proviſional payment when the debtor ſo requires.

502. Thirdly, in the caſe of a ſet-off; for a creditor is obliged to credit to the amount of the ſum which is due him, that which he owes to his debtor, although it may be leſs than what is due him.

503. He who is creditor of a perſon for different debts is obliged to receive the payment, which his debtor tenders, of one of theſe debts; although he does not tender at the ſame time payment of the others.

For the ſame reaſon the debtor of ſeveral years arrearages may oblige the creditor to receive the payment of one year's, though he does not tender at the ſame time payment of the others; for theſe terms of arrears are as many different debts. The creditor cannot however be obliged to receive thoſe of the laſt year before the preceding; *ne rationes ejus conturbentur. Molin. ibid. n.* 44.

According to this principle, Dumoulin, *ibid.*, holds that one who has a long leaſe, viz. from nine to one hundred years, ſubject by a clauſe of the leaſe to the loſs of his right on failure of payment of three years rent, may avoid this penalty by tendering the payment of one year's, before the expiration of the third.

§. III.

How may the thing which is due be paid.

304. The payment of a thing is made only by tranſfering to the creditor by delivery, the irrevocable property of the thing. *Non videntur data quæ eo tempore quo dantur, accipientis non fiunt;* L. 167, ff. *de R. juris.*

Hence it follows, as has been already ſaid in *art.* 1, that the payment of a thing is not valid, when it does not belong to him who gives it in payment without the conſent of the owner.

Nevertheleſs this payment may afterwards become valid, if the creditor who has received it in payment becomes owner of it by the length of time required for a title by preſcription, or at leaſt when he has no longer room to fear a recovery back; as when he who has given it to him in payment has become the ſole heir of the owner of the thing, or when the thing has ceaſed to exiſt, or has been conſumed *bona fide* by the creditor who received it in payment. L. 60, L. 78, L. 94, §. 2, ff. *de ſolut.*

The reaſon is that in theſe caſes what has happened ſince, has ſupplied the defect in the payment by acquiring to the creditor either the property of the thing which he has received in payment, or ſomething equivalent to the right of property.

505. But when a creditor receives in payment, through error, a thing of his own, the payment which is made to him of it, is null in such manner as that it can never become valid; for he never can be presumed to have acquired either really or by equivalent, what belonged to him already. *Quod meum est, amplius meum esse non potest.*

506. When the payment is made to a third person by order of the creditor, it is likewise necessary that the property of the thing which is paid be transferred, either to the creditor when this third person receives it in the name of the creditor and in order to acquire it for him, or to this third person when the intention of the creditor was that it should be acquired by this third person.

Hence it follows that when I have given an order to him who has sold me a tract of land, to make livery of it to my wife to whom I intended to give it, as the payment or delivery which he makes by my order to my wife of this land could not transfer the property to my wife, because gifts between husband and wife are forbidden by the law, nor to me as it was not received for me, the seller remains owner of the land which he has delivered to my wife. This payment then in strictness of law is invalid, and has not discharged the seller; but if it has not discharged him *ipso jure* and in strictness of law, he is discharged *per exceptionem doli*; good faith not permitting me to demand from him a thing which, by my own act, he has been disabled from delivering to me, in delivering it according to my order to my wife. Therefore he no longer remains in this case bound towards me for any thing else but the cession of his right of reclaiming, which I may exercise at my risque. This results from the law 26, ff. *de donat. inter vir. & uxor.*, and from the law 38, §. 1, ff. *de solut.* According to our practice, it would not be necessary even that my debtor should substitute me to his right to claim back; I should be substituted to it *de pleno jure*: L. 84, §. 7, ff. *de solut.*, and notes on this law in *Pand. Justin. tit. de solut. n.* 27.

507. That the payment may be valid, it suffices not

that the property be transferred to the creditor. It ought, as we have ſaid, to be transferred irrevocably; for it is not to tranſfer it truly, to transfer it in a manner that he may not always retain it. *Quod evincitur, in bonis non est;* L. 190, ff. *de R. Jur.*

For example. If the thing given in payment was hypothecated, whether it be the very thing due, or whether it be given in payment of a ſum of money, the debtor would not by ſuch payment be diſcharged from his debt, unleſs he ſhould free the thing from the hypothecation. L. 20, L. 69, L. 98, ff. *de solut.* For ſuch payment not having transferred to the creditor to whom it is made the property of a thing which he may always retain, is not a valid payment and conſequently has not extinguiſhed the debt.

If by a clauſe in the contract the debtor who bound himſelf to give a certain thing, had charged the creditor with the riſk of certain evictions, or the thing was declared by the contract to be of a nature liable to a certain ſpecies of evictions, its ſubjection to theſe evictions, provided there be none to be feared but thoſe with which the creditor was charged, would not invalidate the payment which has been made to him of this thing.

§. IV.

In what condition the thing ought to be paid.

508. When the debt is of a thing certain and determinate, it may validly be paid in whatever condition it may be, provided that any loſſes or decays which have happened ſince the contract, did not proceed either from the act or neglect of the debtor, nor from that of thoſe for whom he is anſwerable, as his workmen or domeſtics.

If it is by chance or the act of a ſtranger that the thing has become injured, the debtor may validly pay it in the condition in which it may be; he is not bound further than to cede to his creditor the actions which he may have againſt him who has cauſed the injury; and when he will not cede them to him, the judge will ſubſtitute the creditor who happens to be the perſon who ſuffers the loſs.

509. It is otherwiſe when the debt is of a thing indeterminate; as if a dealer in horſes has promiſed to his ſon in law, by a contract of marriage, to give him a horſe as part of the portion of his daughter, without ſpecifying what horſe. If one of his horſes becomes blind or diſordered, he cannot give this horſe to diſcharge himſelf from the debt. He ought to give one which has no material defect. L. 33, *in fin.* ff. *de solut.* Otherwiſe if he had obliged himſelf determinately to give to his ſon in law a certain horſe, he would acquit himſelf of his obligation in giving him the horſe ſuch as it may be.

ARTICLE IV.

When payment ought to be made.

510. It is evident that one cannot make payment of a thing before it is due; for while there is yet no debt, there can be no payment. Hence it follows that when a debt is ſuſpended, becauſe the condition under which it was contracted is not yet accompliſhed, payment cannot be made. Not only cannot the debtor be obliged to pay nor the creditor to receive, before the accompliſhment of the condition, but if the debtor, ignorant of the condition, has paid thro' error, he may recall it *per condictionem indebiti*: for in this caſe it is true that he has paid what he did not owe. But the payment which was not valid, is confirmed and becomes valid by the accompliſhment of the condition; for this accompliſhment has an effect retroactive to the time of the contract, which in cauſing the debt to be preſumed to be due from the time of the contract, *supra*, *n.* 220, cauſes, by neceſſary conſequence, the payment which has been made before the condition, to be preſumed to be valid. L. 16, ff. *de cond. indebit.*

511. It is otherwiſe of the time of payment; the time not having the effect to ſuſpend the debt but only to delay the right to demand it, *supra*, *n.* 230. Payment made before the time of payment, is valid. L. 1, §. 1, ff. *de cond. & dem.*

This rule however is liable to ſome exceptions. For

example. If a teſtator has bequeathed a certain ſum to a minor, and in order to prevent the tutor from diſſipating it, he had ordered that it ſhould not be paid till the coming of age of the legatee, the heir by whom the legacy is to be paid, who ſhould pay it before, would not be diſcharged in the caſe of the tutor's inſolvency. L. 16, ff. *de ann. leg. tom.* 2. See, on the time of payment, what we have ſaid *ſupra, part* 2, *chap.* 3, *art.* 3.

ARTICLE V.

Where the payment ought to be made and at whoſe coſt.

§. I.

Where payment ought to be made.

512. When by the agreement there is a place agreed upon where the payment muſt be made, it ought to be made at this place. If there is no place deſignated and the debt is of a thing certain, the payment muſt be made at the place where the thing is. For example. If I have ſold a merchant the wine of my vintage, it is at the place where my wine is ſtored that he ought to receive the payment of it; he ought to ſend there for it at his own expence, I delivering it to him where it is. I am not obliged to remove it, but only to give him the key of my ſtore-houſe and to ſuffer him to take it away. L. 47, §. 1, ff. *de leg.* 1. *Si quidem certum corpus legatum eſt, . . ibi præſtabitur ubi relictum eſt.*

If the debtor, ſince the bargain, has tranſported the thing from the place where it was to another place, from which the removal by the creditor becomes more expenſive, the creditor might claim, by way of damages, what the removal ſhould coſt more than it would have coſt if the thing had remained where it was at the time of the bargain; as the debtor ought not by his own act to make the conditon of the creditor worſe.

513. If the debt is not of a thing certain but of a thing indeterminate, as if one were to give me a pair of gloves indeterminately, a certain ſum of money, a certain quantity of corn, wine, &c. the place of payment cannot in this

caſe be the place where the thing is, ſince the uncertainty prevents the aſſigning of any place where it might be. Where then ſhall it be? According to the law before cited, in this caſe the thing ought to be paid in the place where it is demanded, *ubi petitur*; which is to ſay, at the place of reſidence of the debtor. *Molin. Tr. de Usur.* 9, 9.

The reaſon is, that as agreements reſpecting things in regard to which the parties have not explained themſelves ought to be interpreted rather in favor of the debtor than of the creditor, *in cujus potestate fuit legem apertius dicere, supra n.* 97, it follows from theſe principles, that when they have not explained themſelves reſpecting the place where payment ought to be made, the agreement, ſhould in this reſpect be interpreted in a manner the leaſt burdenſome and expenſive to the debtor.

Our principle, that things indeterminate are payable at the reſidence of the debtor, when there is no place of payment marked out by the agreement, is liable to an exception when two things concur, that is to ſay when the reſidence of the creditor and that of the debtor, are not at much diſtance from each other, as when they reſide in the ſame city, and when the thing due conſiſts in a ſum of money, or in ſome other thing which may be carried or ſent, without expence, to the creditor. When theſe two things concur, the payment ought to be made at the houſe of the creditor; *Molin. ibid.* The debtor owes in this caſe this deference, which coſts him nothing. For want of payment at the houſe of the creditor, the creditor may make a demand on his debtor at the reſidence of the debtor who ought to pay the charges thereof; and the debtor, may pay to the officer who makes the demand.

Although it be expreſsly agreed that the ſum be payable at the houſe of the creditor, which was at the time of the agreement in the ſame city with that of the debtor, and for a ſtonger reaſon, when there is no explanation reſpecting the place of payment; if ſince the contract the creditor has changed his dwelling to another city at a diſ-

tance from that of the debtor, the debtor will be well grounded in demanding that the creditor elect where, in the place in which the contract was entered into, the payment shall be made; this change of the place of payment to a place where the debtor is not accustomed to resort, ought not to be burdensome to the debtor, and to render his condition worse than it was before, according to this rule, *nemo alterius facto prægravari debet*. See, on the place of payment, what has been said *supra part.* 2, *ch.* 3, *art.* 4.

§. II.

At whose expence the payment is to be made.

514. The payment is to be made at the expence of the debtor; therefore if he should require a discharge before a notary, it is at his expence that it should be given.

It is also for this reason that he who has sold wine, should pay at the custom-house for the necessary permit to deliver it.

ARTICLE VI.

Of the effect of payments.

515. The effect of payment is to extinguish the obligation and all that is accessory to it, and to discharge all those who are debtors of it; L. 43, ff. *de solut.*

§. I.

Whether a single payment may extinguish several obligations.

516. Sometimes a single payment may extinguish several obligations: this happens when the thing which is given in payment of the obligation, is the same thing which was the object of another obligation.

For example, If I have agreed with you to sell you, in payment of the sum which you have lent me, the thing which I have given you in pledge; the payment which I make you of this thing extinguishes at the same time the obligation resulting from the loan which you have made me, and that resulting from the sale which I have made you of the thing; L. 44, ff. *de solut:* for this thing which I pay you in performance of the obligation resulting from the

loan of money which you have made to me, is the same thing which makes the object of my obligation resulting from the sale which I have made to you.

517. This rule applies even in regard to different creditors. For example. If, owing you ten thousand livres, I have paid them by your order to your creditor to whom you owed the like sum, this payment extinguishes at the same time two obligations, mine and yours; L. 64, ff. *d. tit*; it discharges me towards you, and it discharges you towards your creditor. This payment contains two, *juris effectu*; for it is as if I had paid you the sum, and you had paid it afterwards to your creditor: *Celeritate conjungendarum inter se actionum, unam actionem occultari*; L. 3, §. 12, ff. *don. inter vir. & uxor.*

518. This rule that the payment made in performance of one obligation, extinguishes the other obligations which have the same object, applies also in regard to different debtors.

For example. If by your order I have lent a sum of money to Peter, the payment which Peter makes me of the sum which I have lent him, extinguishes at the same time the obligation of Peter and your obligation resulting from the mandate which you gave me.

What we have just said, that when there are obligations which, although they proceed from different causes, have however one and the same object, the payment which is made of one of these obligations extinguishes both, applies only in the case in which the debtor who has paid had not the right to require the cession of the actions of the creditor against the debtor of the other obligation. But in the contrary case, when he who has paid had the right to require the cession of the rights and actions of the creditor against the debtor of the other obligation, he extinguishes, in paying, only his own obligation; the other continues, not to the effect that the creditor may cause himself to be paid a second time, but to the effect that he may cede the

action which arises from it, to him to whom he ought to cede it.

For example. If, in the instance above mentioned, I have by your order lent a sum of money to Peter, we have seen that the payment made by Peter extinguishes his obligation and yours: but if before Peter had paid me, you had yourself paid me this sum, in order to be discharged from the obligation resulting from the mandate which you gave me, this payment extinguishes only your obligation, and not that of Peter; because in paying me, you have the right to require from me the cession of my rights and actions against Peter, who therefore remains bound, no longer indeed towards me, who cannot twice exact the same thing, but towards you, in consequence of the cession of my actions which I ought to make to you; L. 95, §. 10. ff. *de solut.* L. 28, ff. *mand.*

This cession of actions against the debtor of a different obligation, may even be made *ex intervallo*, after the payment; in which it differs from that which is made against the co-debtors of the same obligation, of which we are going to speak in the following paragraph.

§. II.

Whether the payment made by one of the debtors extinguishes the obligation of all the other debtors of the same obligation; and of the cession of actions.

519. If the payment of one obligation may discharge the debtor of another obligation, different from it but having the same object, as we have seen in the preceding paragraph, *a fortiori* the payment made by one of the debtors of the same obligation, ought to discharge all the other debtors of this obligation, whether they be principal debtors, or whether accessory debtors, such as are securities.

This rule admits of a limitation in the case of the cession of actions; for if one of the co-debtors or securities, in paying the debt, has caused the rights and actions of the creditor to be ceded to him, the debt is not holden to

be extinguiſhed in regard to thoſe againſt whom the actions of the creditor have been ceded to him.

Several queſtions ariſe in regard to this ceſſion of actions. I. who are thoſe who, on paying a debt, have a right to require the ceſſion of the actions of the creditor againſt the other debtors who are liable for it? II. Is the creditor bound in ſuch a manner to make this ceſſion of actions, that he cannot demand his debt in the whole or in part, from thoſe to whom he is bound to make it, when he has diſabled himſelf by his own act from making it? III. Is this ceſſion of actions made *de jure* or ought it to be required and when may it be required? IV. What are the effects of this ceſſion of actions?

On the firſt queſtion it is to be holden as a principle that all who are bound for a debt for others or with others, by whom they ought to be diſcharged, either for the whole, or a part, have a right, in paying ſuch debt, to require the ceſſion of the actions of the creditor againſt the other debtors who are liable for it.

It is on this principle that Julian decides that the ſecurity ought, in paying, to obtain the ceſſion of the actions of the creditor as well againſt the principal debtor as againſt all the others who are liable for it: *Fidejussoribus succurri solet, ut stipulator compellatur ei qui solidum solvere paratus est vendere cæterorum nomina;* L. 17, ff. *fidej.*

For the ſame reaſon, the creditor cannot refuſe to a debtor *in solidum* from whom he exacts the whole debt, the ceſſion of his actions againſt the other debtors; L. 47, ff. *locat.*

This obligation of the debtor to cede his actions, is grounded on this rule of equity that, being commanded to love all men, we are bound to grant them every thing which they have an intereſt in having, when we may do ſo without injuring ourſelves.

A debtor *in solidum* having, then, a juſt intereſt in having the actions of the creditor againſt his co-debtors, to make

them pay their part of a debt which they owe as well as he, the creditor cannot refuse it. For the same reason he cannot refuse it to a security, and generally to all those who, being bound for the debt, have an interest in being discharged, in the whole or in part, by those for or with whom they are debtors.

But when a stranger pays a debt for which he was not bound, and in the discharge of which he had no interest, the creditor is not bound, unless he pleases, to cede to him his actions. L. 5, *Cod. de solut.*; for he was not in need of them, since nothing compelled him to pay the debt.

This is liable to an exception in the case of bills of exchange. When a stranger for the honor of the drawer, one of the indorsers or the acceptor, pays a bill of exchange, of which he is not debtor, not only cannot the cession of the actions of the creditor of the bill of exchange be refused him, but he is subrogated to them *de jure* by the ordinance of 1673, as we have seen in our treatise on bills of exchange; this has been established in favor of commerce.

520. As to the second question, whether the creditor ought to be excluded from his demand *per exceptionem cedendarum actionum*, against one of his debtors, when by his own act he is disabled from ceding to him his actions against the other debtors; this is liable to no difficulty in regard to *mandatores pecuniæ credendæ*. Papinian decides it in formal terms in the law 95, §. 11, ff. *de solut. Si creditor a debitore culpa sua causa ceciderit, prope est ut actione mandati nihil a mandatore consequi debeat; cum ipsius vitio acciderit ne mandatori possit actionibus cedere.*

The reason of this is evident. It is a common principle in all synallagmatic contracts, that when we have contracted reciprocal obligations, I am not to be admitted to demand from you the performance of yours, when by my own fault I fail in the performance of mine. According to this principle when by my order you have lent a certain sum of money to Peter, and by your own fault you have lost

the action, which you had acquired by this loan, and you cannot consequently cede it to me, you ought not to be admitted to demand from me this sum, for the reimbursement of which I am bound by the contract of mandate which took place between us; since on your part you have, by your own fault, disabled yourself from performing the obligation which you have, by this contract, contracted towards me, to cede to me the action which you have acquired by the loan you made to Peter in the execution of my mandate. See *supra*, n. 445.

Ought the same decision to be applied to the case of securities? May a security from whom the creditor demands the payment of a debt for which he has become a security, prevent the demand from being received, because the creditor has by his own act disabled himself from making the cession of his actions to the security, which he, by the payment, might require? The reason to doubt is that I do not see any text of law which formally decides thus in regard to securities. The law 15, §. 11, above cited, which gives this plea to *mandatores pecuniæ credendæ*, does not appear to me decisive for securities; as there is not the same reason for it. He who has lent a sum of money to Peter by the order of another, has, by the contract of mandate included in the order which he has executed, contracted a formal obligation towards the *mandator pecuniæ credendæ*, to secure and cede to him the action which he acquired by the loan made to Peter in execution of the mandate. The same cannot be said in regard to a security, that the creditor has contracted towards him the obligation to secure and cede to him his actions: the securityship is an unilateral contract by which the security alone is bound. If the creditor is obliged to cede his actions to the security at the time of the payment which he makes him, it is equity alone which obliges him, because he has no interest to refuse to cede them; but he ought only to be obliged to cede them as fair and such as he has them, and he ought not to be blamed for not having kept them and for having disabled himself from ceding them. Another difference may be added which

is observed by Cujas, *ad l.* 21, ff. *de pact.* He by whose order I have lent a sum of money to Peter, having no action against Peter, has need absolutely that I should cede to him my actions against Peter; but a security, having in his own right an action against the principal debtor for whom he has become a security, has not an absolute need of the cession of the action of the creditor against the principal debtor, although the cession of the hypothecations might be useful to him; *Nec usquam legitur*, says Cujas, *cogi creditorem fidejussori cedere actionibus sortis.*

Not only is there no text of law which decides that the security may exclude the creditor from his demand for the whole or a part, when he has by his own act disabled himself from ceding his actions, whether against the principal debtor, or against the other securities; there is also room to suppose the contrary. The law 22, ff. *de pactis*, decides that a creditor may agree with the principal debtor not to demand from him the payment of the debt, and yet reserve to himself the right to demand it from the security. In this instance, the creditor may demand from the security the payment of the debt, although he has disabled himself from ceding to him his action against the principal debtor, which has become ineffectual by the agreement which the creditor has made with this debtor, who has thereby acquired the plea *pacti*. The law 15, §. 1, ff. *de fidej.*, appears also to decide that the creditor who by his own act has disabled himself from ceding to one of the securities his actions against the other, was not thereby in any manner excluded from his demand: *Si ex duobus qui apud te fidejusserant in viginti, alter, NE AB EO PETERES, quinque tibi dederit vel promiserit; nec alter liberabitur; & si ab altero quindecim petere institueris, nulla exceptione summoveris.* Yet the creditor had disabled himself from making to him from whom he demanded the fifteen crowns which remain due to him, the cession of his actions against the other, by which he would have had recourse against him for the five crowns. Notwithstanding these reasons, it must

be decided that when the creditor has disabled himself from ceding to the security his actions, whether against the principal debtor or against the other securities, whether because he has discharged them or whether he has by his own fault suffered them to become discharged from his demand against them, the security may, *per exceptionem cedendarum actionum*, prevent the demand of the creditor from being received, because the creditor has disabled himself from making the cession of his actions which the security has a right to require.

There is no difficulty in this with regard to the action against the principal debtor: for as we have observed *supra*, *n.* 370, it being of the essence of suretiship that the security should not be bound to more than the principal debtor, the discharge which the creditor grants to the principal debtor, discharges likewise the security, and all the pleas *in rem* and prescriptions which the principal debtor acquires, are acquired by the security. We have replied *supra*, *n.* 380, to the law 22, *de pactis*.

When the creditor has disabled himself from ceding to the other securities the action which he has against one of them, in discharging this security or in suffering him to become discharged, we must likewise decide that the creditor ought, *per exceptionem cedendarum actionum*, to be excluded from his demand against the other securities, not for the whole, but for the part for which they would have had recourse against the security who has been discharged, if the creditor had not disabled himself from ceding his action against him. For example. If there were four securities all solvent, the creditor cannot demand his debt from three of them, except with a deduction of a fourth for which they would have recourse against him who has been discharged; and if among the three there was one insolvent, the creditor ought to make to the two that are solvent a deduction, not only of the fourth for which he who has been discharged was liable in his own right, but also of the third part which this security ought to bear of the share of the insolvent.

The reaſon of this deciſion is, that when ſeveral perſons together become ſecurities for a principal debtor, they count upon the recourſe which they may have againſt one another; it is in this confidence that they contract an engagement which they would not have contracted without it; it is not juſt then that the creditor ſhould deprive them of it by his own act.

Obſerve that if the ſecurity, diſcharged by the creditor, had only become a ſecurity ſince the ſecuritiſhip of the others, theſe would not have the plea *cedendarum actionum* againſt the creditor; for in contracting their ſecuritiſhip they had no right to count on a recourſe againſt him who has been diſcharged, ſince he was not then a ſecurity. It is to this caſe that the deciſion of the law 15, §. 1, above cited, muſt be reſtricted.

It is neceſſary to ſay in regard to debtors *in ſolidum* what we have ſaid in regard to ſecurities. When ſeveral perſons contract an obligation *in ſolidum*, they oblige themſelves each for the whole, only in the confidence that they may have recourſe againſt one another on paying the whole. Therefore when the creditor by his own act has deprived them of this recourſe, in diſabling himſelf by his own act from ceding his actions againſt one of them whom he has diſcharged, he ought no longer to be allowed to proceed againſt the others *in ſolidum*, except with a deduction of the part for which they would have had recourſe againſt him whom he has diſcharged. See *ſupra n.* 275.

When the creditor has loſt ſome hypothecary claim upon the property of one of his debtors, whether by failing to oppoſe the decrees which may have been made reſpecting it or by failing to interrupt third purchaſers, who have acquired it without the charge of hypothecation or have obtained a diſcharge therefrom by the poſſeſſion of ten or twenty years, may the co-debtors *in ſolidum* and the ſecurities oppoſe to this creditor the plea *cedendarum actionum*, on the ground that he has diſabled himſelf from ceding to them the hypothecary action which reſults from the hypo-

thecation he has ſuffered to be loſt and upon which action they counted for the ſafety of the recourſe which they would have had, in paying the whole againſt the debtor to whom the property, of which the creditor has loſt the hypothecation, belonged? I do not think they would be well grounded in this. The plea *cedendarum actionum* ought not, it appears to me, to be oppoſed to him when it is either by a poſitive act on his part that he is diſabled from ceding his actions againſt one of the debtors, in diſcharging his perſon or property, or when, by ſuffering his demand againſt the debtor to come to be without remedy, he is ſuſpected of colluſion. But a ſimple negligence on his part, in not having interrupted the purchaſers, or in not having oppoſed the decrees, ought not to be imputed to him as a fault; I. becauſe, as he is not bound to make the ceſſion of his actions but by a mere reaſon of equity, and as he has not contracted in this reſpect towards the other debtors and ſecurities, any preciſe obligation to ſecure his actions to them, it ſuffices that he act in this reſpect with good faith, that is to ſay, that he do nothing contrary to this obligation; and he ought not in this reſpect to be liable for a mere negligence. II. The other debtors and ſecurities have power alſo to watch the preſervation of the hypothecary right which is loſt; they may ſummon him to interrupt at their riſk the third purchaſers, or to oppoſe the decrees. It is only in this caſe in which they may have put the creditor in default, that they may complain that he has loſt his hypothecation; but when they have been no more vigilant than he, they ſhall not be allowed to oppoſe to him a negligence which is theirs in common with him.

521. The third queſtion, whether the ceſſion of the actions of the creditor is made *de pleno jure*, has already been diſcuſſed, *ſupra*, *n.* 280, in regard to joint debtors *in ſolidum*. We have eſtabliſhed, contrary to the opinion of Dumoulin, that it does not take place *de pleno jure*, and that it ſhould be required; but that when it has been required, it is not neceſſary in our practice to proſecute the creditor who had refuſed; that the law would apply itſelf to the re-

fusal of the creditor, and transfer his actions to him who had required the cession of them. All which we said in regard to debtors *in solidum*, takes place likewise in regard to securities.

This cession should be made or required at the time of payment; otherwise, as the payment has extinguished the debt, and the actions of the creditor, one can no longer make a cession of actions which no longer exist.

Mandatores pecuniæ credendæ are the only persons who, for a particular reason, can, *ex intervallo*, cause themselves to be subrogated to the actions of the creditor. See this reason *supra*, *n.* 445.

Observe that there are cases in which the law transfers the rights and actions of the creditor, to the person who has paid the debt, although he has not required this cession. These cases are, I. when one, in order to prevent the protest and for the honor of the drawer, has of his own accord paid a bill of exchange, he is then subrogated *de jure ipso* to all the rights and actions of the creditor of the bill of exchange, as we have seen *supra*, *n.* 520, *in fine*.

II. When, during the community of property between husband and wife, an annuity due only from the wife, has been redeemed out of the monies of the community, the husband or his heirs are for his part in the community subrogated *de jure* to all the actions of the creditor against the wife, who was the debtor of the annuity, or against her heirs; *& sic vice versa*. Paris, 244, 245.

See what we have said on this subject in our introduction to title 10 of the custom of Orleans, *chap.* 6, L. 4.

III. When a creditor with hypothecation, to fortify his hypothecation, pays to another creditor with hypothecation, what is due him by the common debtor, this creditor has no need to require the subrogation; he is subrogated *de jure* to the claim which he has discharged, and to the hypothecations and rights which are attached to it. L. 4, *Cod. de his qui in prior.* It is evident that he paid on-

by to have this ſubrogation. See our introduction to title 20 of the cuſtom of Orleans, *n.* 71.

In regard to a third perſon detaining the poſſeſſion of an eſtate, who, in order to avoid the delay, has paid the debt for which his eſtate was hypothecated; if, in paying, he has failed to require a ſubrogation to the rights of the creditor, he will not indeed be ſubrogated to all the rights of the creditor; but he may at leaſt, according to our uſages, exerciſe them upon the eſtate of which he detains the poſſeſſion, againſt all the other creditors poſterior to the one he has paid: for in exonerating the eſtate from this hypothecation, *meliorem fecit in eo fundo cæterorum creditorum pignoris causam*; which gives him a plea againſt them, *exceptionem doli*, to retain what he has paid to diſcharge this hypothecation. Good faith does not permit that they ſhould profit at his expence by this diſcharge. *Dolo faciunt, si velint cum ejus damno locupletari.* This caſe is like that of a perſon detaining an eſtate ſubject to hypothecation, who has made improvements upon it. See our introduction, *ibid. n.* 72.

The ceſſion of actions, or at leaſt the requiring of this ceſſion, is neceſſary for the ſubrogation to the claims of the hypothecation, except in the caſes which we have juſt reported. But in regard to claims which have a perſonal privilege attached to them, ſuch as thoſe for funeral expences, expences of laſt ſickneſs, houſe-rents, ground-rents, duties, &c., it is not neceſſary to require the ſubrogation to them: the privilege attached to theſe claims paſſes *de jure* to thoſe who have acquired them, and they exerciſe them in the manner in which the privileged creditor whom they have paid out of their money might have exerciſed them. *Eorum ratio prior est creditorum quorum pecunia ad creditores privilegiarios pervenit.* L. 24, §. 3, ff. *de reb. auth. Jud. poss. alias.* L. 9, §. 3, ff. *de privil. cred.*

527. On the fourth queſtion, what is the effect of the ceſſion of actions, it is neceſſary to conſult the law 36, ff.

de fidej. It informs us that the payment which is made by any one to a creditor, with ſubrogation to his rights and actions, is conſidered to be a payment, only as it is a ſale which this creditor is conſidered to make of his claim and of all the rights which are attached to it, to him from whom he received the money. *Non in ſolutum accepit, ſed quodammodo nomen debitoris venaidit. d.* L. Therefore the claim which is thus diſcharged, is, in favor of him who is ſubrogated, reputed to continue with all the rights which are attached to it; he may exerciſe them as the creditor might have done, for whom he is conſidered to be an attorney *in rem ſuam.*

This ſubrogation is not for the whole, except when he who pays ought to have recourſe for the whole; as when he who pays is a ſecurity who has recourſe for the whole againſt the principal debtor.

But when he who pays ought not to have recourſe but for part, and is debtor without recourſe and for himſelf of the ſurplus, the ſubrogation will not take place but for the part for which he may have recourſe; and the payment would be, for the part of which he is debtor without recourſe and for himſelf, an abſolute payment, which will entirely extinguiſh the debt for this part.

For example. Suppoſe there were four debtors *in ſolidum*, of a debt; if one of them, who is debtor for the whole towards the creditor and for a fourth part with regard to his co-debtors, pays this debt in the whole, with ſubrogation, the ſubrogation cannot take place but for the three fourths for which he ought to have recourſe againſt his co-debtors; but for the fourth of which he is debtor without recourſe, the payment made by this debtor, is an abſolute payment, which extinguiſhes the debt for this part.

523. It is a great queſtion, whether the debtor may have *in ſolidum* againſt each of his co-debtors the actions of the creditor to which he is ſubrogated for the three fourths we have treated of this at large *ſupra*, *n.* 281. One may make the ſame queſtion in regard to a ſecurity, ſubrogated

to the actions of a creditor againſt his co-ſecurities, and the ſame deciſion ought to be made; the ſame reaſons obtain.

It remains for us to obſerve that it is only by a fiction of law, eſtabliſhed in favor of him who has paid with ſubrogation, that the claim is conſidered to continue. In truth it is paid and extinguiſhed; for the true intention of the parties was to make a payment and not a transfer. Therefore when one, in redeeming an annuity of which he was a debtor *in ſolidum* or a ſecurity, is ſubrogated to the rights of the creditor of this annuity, he is not liable for the hypothecations which the creditors of the creditor who was proprietor of this annuity had upon it, as he would be a perſon to whom it was truly ceded, to whom the creditor has made a tranſfer of it: the redemption which he has made of it, although with ſubrogation, being a true payment, has extinguiſhed the annuity and conſequently the hypothecations, which are extinguiſhed *rei obligatæ interitu*. The ſubrogation to the actions of the creditor, being eſtabliſhed in favor of him who has paid, cannot be oppoſed to him, according to this maxim: *Quod in favorem alicujus introductum est, non debet contra ipsum retorqueri*.

§. III.

Of the effect of partial payments.

524. Regularly the payment of a part of what is due, extinguiſhes the debt for this part. For example. If you owed me ten crowns, and you have paid me five of them, the debt is extinguiſhed as to half. L. 9, §. 1, ff. *de so'ut.*

525. This rule admits of three exceptions. The firſt is in regard to obligations in an alternative, which are not diſcharged in part by the payment which is made of a part of one of the two things which are due in the alternative, until the other part of the ſame thing is paid. For example. If a peaſant has promiſed to give his daughter in marriage a certain cow or twenty crowns, and he pays his ſon in law ten crowns; he does not diſcharge by this payment any part of his obligation, while the cow is living;

until he has paid the remaining ten crowns. The payment which he has made is until this time in ſuſpence; it is that of the ten crowns remaining which will make it valid, and wholly diſcharge the debt. If he ſhould think proper to pay the cow, the payment of the ten crowns which he had before made would be null, and he might recall this ſum as paid and not due; L. 26, §. 13, ff. *de cond. ind.*

If after having paid the firſt ten crowns, the cow dies, in this caſe the cow can no longer be paid; and the obligation becoming determinate for the ſum of twenty crowns promiſed, the payment of the firſt ten crowns will become valid, and the debt will be extinguiſhed as to half.

526. The ſecond exception is in regard to obligations of a thing indeterminate, *obligationes generis.* It is neceſſary to ſay in this reſpect the ſame that we have ſaid in regard to obligations in an alternative. For example. If a peaſant has promiſed to his daughter in marriage, a horſe indeterminately, and in diſcharge of this obligation he gives the part which he has in a certain horſe in common with his neighbour; he is not diſcharged from any part of his obligation, until he has redeemed the part which his neighbour has in this horſe, and has ceded it to his ſon in law. Until then, notwithſtanding the payment which he has made of the part which he had in this horſe, his ſon in law may demand of him an entire horſe, on offering however to render to him what he has given for part. L. 9, §. 1, ff. *de ſolut.* Theſe deciſions apply whether the obligation in an alternative, or of a thing indeterminate, has been contracted by one or by ſeveral debtors, whether towards one or ſeveral creditors. L. 34, §. 1, ff. *de ſolut. d.* L. 26, §. ff. 14, *de cond. indeb.*

527. The third exception is, when a debtor has given one or ſeveral determinate things in payment of a ſum which he owed. If this payment is found not to be valid for a part, by the eviction which the creditor ſhould ſuffer as to a part of the things which he received in payment, it would not extinguiſh the debt for any part; and the cred-

itor might, on offering to render him what remained of the things which were given him in payment, exact the entire debt; becauſe he would not have received the thing in payment, if he had not believed he could retain the whole; L. 46, *pr.* L. §. 1, ff. *de solut.*

ARTICLE VII.

Rules respecting the application of payments.

First rule.

528. The debtor, when he pays, has the right to declare to what debt he intends to apply the ſum which he pays: *Quoties quis debitor ex pluribus causis, unum solvit debitum, est in arbitrio solventis, dicere quod potius debitum voluerit solutum;* L. 1, ff. *de solut.*

The reaſon Ulpian adduces for this, is an evident one; *possumus enim certam legem dicere ei quod solvimus; d.* L.

According to our rule, although regularly the intereſt ought to be paid before the principal, yet if the debtor who owed principal and intereſt, in paying a ſum of money, declared that he paid it upon the principal, the creditor who was willing to receive, cannot afterwards conteſt this application. *Respondi si qui daret, in sortem se dare dixisset, usuris non debere proficere.* L. 102, §. 1, ff. *de solut.*

Second rule.

529. When the debtor, in paying, makes no application, the creditor to whom it is due for different cauſes, may apply it to the diſcharge of which he pleaſes. *Quoties non dicimus in id quod solutum sit, in arbitrio est accipientis, cui potius debito acceptum ferat. d.* L.

It is neceſſary, firſt, that this application ſhould have been made at the time. *Dummodo in re præsenti fiat, in re agenda, ut vel creditori liberum sit non accipere, vel debitori non dare, si alio nomine solutum quis eorum velit; postea non permittitur.* L. 2, §. 3, ff. *hac. tit.*

It is neceſſary, II. that the application which the creditor makes ſhould be equitable: *In arbitrio est accipientis cui potius debito acceptum ferat; dummodo,* adds the law, *in*

id constituat solutum, in quod ipse si deberet, esset soluturus, id est, non in id debitum quod est in controversia, aut in illud quod pro alio quis fidejusserat, aut cujus dies nondum venerat; d.* L. 1, ff. *de solut.*

Bachovius, *ad Treut. t.* 2, *disp.* 29, *th.* 3, *l.* 6, says that this limitation ought to be underſtood in this ſenſe, that while the thing is yet entire, while the debtor has not yet received from the creditor an acquittance which includes the application, he may prevent the creditor from applying the payment he has made to thoſe debts which the debtor has leſs intereſt to diſcharge, and conſequently may demand that the creditor ſhould make an equitable application by his acquittance, or return him his money. But when the debtor has conſented to the application in receiving an acquittance which includes it, he cannot, according to Bachovius, contradict this application, although it be made to a debt which he has the leaſt intereſt to diſcharge; becauſe *volenti non fit injuria*, and becauſe otherwiſe it would not be true to ſay that, when the application has not been made by the debtor, the choice of the application is referred to the creditor: for if we ſuppoſe that the creditor may only make the application to the debt which the debtor has the moſt intereſt to diſcharge, and conſequently to the debt upon which the right of application applies, in the caſe in which the creditor has not made any, it follows that that which the creditor does make is uſeleſs and that he has not the choice. Such is the reaſoning of Bachovius.

We may anſwer to this reaſoning, that in order that the rule which refers to the creditor the choice of the application, when the debtor does not make it, may be true, it is not neceſſary that the creditor in all theſe caſes, ſhould make his choice; it ſuffices that he may make it in certain caſes: and he may when the different debts for which the debtor is bound, are ſuch as that it is not material to the debtor

* *It is here the negation ought to be placed, which is misplaced in the Florentine text: this correction is necessary for the sense of the text.*

that one ſhould be diſcharged rather than the other. In theſe caſes the creditor has the choice of application, when the debtor does not make it; and as, if he had not in fact made any application, it would be made to the oldeſt debt, or to all by contribution, in caſe of a concurrence of debts, as we ſhall ſee hereafter, the application would be to that to which the creditor would chooſe to make it.

Suppoſe, for example, that I am your creditor of the ſum of one thouſand livres for the price of an eſtate which I ſold you in the year one thouſand ſeven hundred and fifty, by a deed before a notary; and further, of another ſum of one thouſand livres for the price of another eſtate which I ſold you in one thouſand ſeven hundred and ſixty. After having paid me the intereſt on theſe two ſums, you pay me the ſum of one thouſand livres without appointing to which of the two debts you intend to pay it; it is indifferent to you to which of the two I make the application, ſince both are with hypothecation, are demandable and produce intereſt; but it is of much conſequence to me to make this application to the debt of one thouſand ſeven hundred and ſixty in order to preſerve my hypothecation for that of one thouſand ſeven hundred and fifty; for if I do not ſo make the application, it will be the debt of one thouſand ſeven hundred and fifty which, as the oldeſt, would be preſumed to be paid.

The other plea of Bachovius appears more plauſible, which is, that the debtor, who, in accepting the acquittance which includes the application, has conſented to this application, is not to be received to contradict it, whatever intereſt he may have that it ſhould be made to another debt. However I do not think we ought to decide, without diſtinction, that he ſhould not be received: for if the debtor is a perſon who does not know how to read, or is a ſimple and untaught perſon, this application which has ſlipped into the acquittance, ought not to prejudice him, when the ſum paid equals or ſurpaſſes that of the debt which the debtor had the moſt intereſt to diſcharge, ſo that the cred-

itor could not have had any reaſon to diſpenſe with making the application which the debtor had an intereſt in having made. For example. Suppoſe that a peaſant owed an attorney on one account the ſum of three hundred livres, demandable, for the price of a piece of land which he had ſold him and about a year's intereſt; and that he owed him on another account, five or ſix hundred livres for fees. If this peaſant brings to the attorney the ſum of four hundred livres, and the attorney gives him an acquittance for this ſum, mentioning that it is on account of fees due him; it is evident that this application which he makes of the payment, to his fees, is a ſurpriſe upon the debtor, and that the debtor has a right to demand that, notwithſtanding what is made to appear by the acquittance, the payment ſhould be applied to the three hundred livres which he owed for the price of the land, and that the intereſt ſhould be declared in conſequence thereof to have ceaſed from the day of the acquittance. On the contrary, when the creditor can have ſufficient reaſon to diſpenſe with making the application to the debt which it moſt concerns the debtor to diſcharge, *puta*, becauſe the ſum paid was leſs than that due for this cauſe, and the creditor was not obliged to receive in part the payment of this debt, the application made to another debt cannot in this caſe be contradicted; becauſe in this caſe the creditor who had a right to refuſe the payment which was made to him, has not accepted it but on the condition of the application which he has made of it, and which was agreed between him and the debtor.

Obſerve that when it is expreſſed in the acquittance that the ſum is received to be credited on all the different demands of the creditor, *ex univerſo credito*, this general application is preſumed to comprehend only the demands for which the creditor has an action, and not claims merely natural; L. 94, §. *fin de ſolut.*

This expreſſion, it alſo appears to me, ought only to comprehend thoſe debts of which the time of payment has arrived.

Third rule.

550. When the application has not been made either by the debtor or the creditor, the application ought to be made to that of the different debts which the debtor had, at the time, the moſt intereſt to diſcharge.

First corollary.

The application ought to be made rather to the deb not conteſted, than to that which was conteſted; rather to that of which the payment had fallen due when the debtor paid, than to that of which the time had not yet arrived. L. 3, §. 1, L. 103, ff. *de solut.*

Second corollary.

Among ſeveral debts of which the time of payment is come, the application ought to be made rather to that for which the debtor was conſtrainable by his perſon, than to debts merely civil.

Third corollary.

Among civil debts the application ought rather to be made to thoſe which produce intereſt, than to thoſe which do not.

Fourth corollary.

The application ought to be made rather to an hypothecary debt than to a debt which is chirographical; L. 97, ff. *de solut.*

Fifth corollary.

The application is made rather to the debt for which the debtor has given a ſecurity, than to thoſe which he owes alone; *d.* L. 4, *in fine*; L. 5, ff. *d. tit.* The reaſon is, that in paying the former, he diſcharges himſelf towards two creditors, towards his principal creditor, and towards his ſecurity, whom he is bound to indemnify. One has more intereſt to diſcharge himſelf towards two than towards one alone.

Sixth corollary.

The application ought to be made rather to a debt of

which he who has paid was principal debtor, than to those which he owed as a security for other persons; *d.* L. 97; L. 4, ff. *d. tit.*

All these corollaries may, from the circumstances, admit of exceptions, which are left to the discretion of the judge.

For example. Although the debt, of which the time of payment has arrived, has a preference, in regard to the application, to that of which the time has not arrived, yet if that, whereof the time has not arrived, would become due in a few days, and would make his person liable, think that it ought to be preferred, in regard to the application, to another debt whereof the time had arrived; for it was the interest of the debtor to discharge rather a debt for which he would in a few days be constrainable by his person, although the time of payment had not yet arrived, than to discharge other ordinary debts of which the time had arrived.

Likewise, although the debt which brings this constraint, be preferable, in the application, to other debts merely civil, yet if the debtor was a person who, from his dignity and wealth, had room to expect that his creditor would not use towards him the rigor of this constraint by his person, this debt, if it did not bear interest, ought to yield in the application, to another debt, merely civil which would have carried interest.

Fourth rule.

531. When the debts were of equal nature and such as that the debtor had no interest to discharge one sooner than the other, the application ought to be made to the oldest. *Si nulla causa prægravet, in antiquiorem*; L. 5, ff. *d. tit.*

Observe that of two debts contracted the same day, but with different times of payment that, whereof the time is the shortest, and which is consequently soonest due, is presumed to be the oldest. L. 89, §. 2, ff. *hoc. tit.*

Fifth rule.

532. If the different debts were of the same date, and

all other things equal, the application will be made proportionably to each. *Si par et dierum et contractuum causa sit, ex summis omnibus proportione solutum*; L. 8, ff. *de solut.*

Sixth rule.

533. In debts which are of a nature to produce intereſt, the application is made to the intereſt, before the principal: *Primo in usuras, id quod solvitur, deinde in sortem, accepto feretur*; L. 1, *Cod. hoc. tit.*

This applies even when the acquittance ſhould expreſs that the ſum was paid on account of principal and intereſt, *IN SORTEM et usuras.* The clauſe is underſtood in this ſenſe, that the ſum is received on account of the principal after the intereſt is diſcharged. L. 5, §. *fin.* ff. *de solut.*

Obſerve that if the ſum paid exceeds what is due for intereſt, the application is made to the principal, even when it was expreſſed to be made to the intereſt, without mention of the principal; L. 102, §. *fin.* ff. *de solut.*

This deciſion ought to be underſtood of ſuch principal as is demandable. But if the debtor of an annuity has, through error paid more than he owed for the arrearages of this annuity, he may recall the overplus and it cannot be demanded that the application ſhould be made to the principal of this annuity; for, properly ſpeaking, the principal of an annuity is not due; it is only *in facultate luitionis*, and the creditor is not preſumed to have conſented to the redemption of his annuity in part.

534. The rule which we have eſtabliſhed that the application ought to be made to the intereſt before it is made to the principal, does not apply in regard to ſuch intereſt and damages as are due by a debtor as the penalty of his arrear, from the day of a judicial demand. Theſe are adjudged as damages and form a debt diſtinct from the principal; and what the debtor pays, when there is in fact no application, is applied rather to the principal than to theſe damages, according to the third corollary, *supra*. Such is our law. Decree, 8th July, 1649, 1ſt vol. *Journal des Au-*

diences. Another, 15th July, 1706, *Journal des Audiences.*

535. When the creditor himſelf pays the price of a thing which was hypothecated to him, and which he has ſold, there are other rules, than thoſe which have been above eſtabliſhed, for the application of the payment.

First rule.

The firſt rule is, that the application ought in this caſe to be made to the debt for which the thing was hypothecated, rather than to thoſe for which it was not. Whatever intereſt the debtor may have to diſcharge them rather than this; L. 101, §. 1, ff. *de solut.*

Nota. When the debt for which the thing was hypothecated carries intereſt, the creditor may make the application to the intereſt before he does to the principal; L. 48, *de tit.*

Second rule.

When the thing was liable for different debts, the application is made to that whereof the hypothecation was the ſtrongeſt. For example. If one of the debts has a privileged hypothecation and the others only a ſimple hypothecation, the application will be made firſt to the debt of which the hypothecation was privileged. In the caſe of ſimple hypothecations, the application is to be made to the debt, the hypothecation of which is the oldeſt. If the hypothecations are equal, the application ought to be made to all by contribution, *pro modo debiti*; L. 96, §. 3, ff. *de tit.*

ARTICLE VIII.

Of conſignation, and tender of payment.

536. Conſignation is a depoſit which the debtor makes by authority of the court, of the thing or ſum which he owes, in the hands of a third perſon.

537. Conſignation is not properly a payment; for payment eſſentially includes the transferring of the property of the thing which is paid, to the creditor; *supra*, n. 504. And it is evident that the conſignation does not transfer the property of the thing conſigned, to the creditor; as the

creditor can only acquire it by receiving voluntarily the thing which is tendered to him. *Dominium non acquiritur nisi corpore & animo.* But though the consignation which is made on the refusal of the creditor to receive the thing or sum due him, which is tendered to him be not an actual payment; yet when it is made validly, it is equivalent to a payment, and extinguishes the debt, as well as actual payment made to the creditor. *Obsignatione totius debitæ pecuniæ solemniter facta, liberationem contingere manifestum est;* L. 9, *Cod. de solut.*

538. In order that the consignation may be valid and may be equivalent to payment, it is necessary that it should not have been in the power of the debtor to pay the creditor, and that the creditor should have been put in arrear to receive, by a valid tender made to him.

In order that the tender may be valid it is necessary, I. that it be made to the creditor, if he be capable of receiving, otherwise to him who is qualified to receive in his stead, as his tutor, his curator, &c.

If there was a person indicated in the contract to whom the payment might be made, the tender might be made to that person: for the debtor having a right by the law of the agreement, to pay to this person, it is a consequence of this right, that he should not be obliged to seek the creditor.

539. It is necessary II. that the tender should be made by a person capable of paying; for he who is incapable of paying is incapable of tendering.

540. It is necessary, III. that the tender should be of the entire sum, unless the agreement gives to the debtor the right to pay in parts; otherwise the tender does not put the creditor in arrear, who was not bound to receive his debt in parts.

541. It is necessary, IV. that, when the debt has been contracted under a condition, this condition should have happened; and if there has been a time of payment

ſtipulated in favor of the creditor, that this time ſhould have arrived: for as long as the creditor cannot be compelled to receive, the tender which is made to him, does not put him in arrear.

542. It is neceſſary, V. that the tender ſhould be made at the place where the payment ought to be made: *Ita demum oblatio debiti liberationem parit, si eo loco quo debetur, solutio fuerit celebrata;* L. 9, *Cod. solut.*

Therefore if the ſum due be payable to the creditor at his houſe, the tender cannot be validly made but at his houſe. If the ſum be payable at another place, the tender may be made to him where, in this place, he elected to receive it; and if he has not elected where, the debtor ſhould cite him, perſonally or at his houſe, to appear before the judge, to ſhew cauſe why he ſhould not be compelled by order of the judge to appoint where, in that place, the debtor may make payment; otherwiſe, why the debtor ſhould not have leave to conſign.

If the thing due be a thing determinate which ought to be delivered at the place where it is, the creditor is to be cited, perſonally or at his houſe, to take it away; and on this citation, which is equal to a tender, the debtor may be authoriſed by the judge to depoſit the thing ſomewhere elſe, if he has occaſion for the room which it occupies.

543. Finally, an inſtrument ought to be drawn out ſtating the tender and the ſummons made in conſequence of it to the creditor to receive. This ought to be done by an officer and clothed with the ordinary formalities: it is cuſtomary to have it atteſted by witneſſes who may prove the tender.

The creditor ſhould be ſummoned to appear before the judge, without delay, that the conſignation may be ordered. The judgment by which the conſignation is ordered, ought to be notified to the creditor with a ſummons to be preſent at the conſignation, at a certain place, day and hour.

544. It is not however neceſſary to the validity of the conſignation, that it be preceded by the order of the judge. Although the debtor has not cited the creditor before the judge, yet if he has ſimply declared to the creditor that on his refuſal he would conſign at a certain place, day and hour, the conſignation purſuantly made and duly notified to the creditor, will be valid, and the judgment which may be afterwards obtained, confirming it, will have a retroactive effect to the time when it was made. Decree, 11th Auguſt, 1773, *Journal des Audiences.*

544. This conſignation ought to be made at the day and hour appointed: in order to be valid, it ought to be of the whole ſum due, unleſs the debtor has, by the agreement, a right to pay in parts. An inſtrument, ſtating the conſignation and containing an account of the money in which the ſum has been paid, is drawn up and notified to the creditor.

545. The effect of the conſignation is, that if it be judged valid, the debtor is holden to have been diſcharged by it: and although, *subtilitate juris*, he remains proprietor of the coins conſigned, till they be taken by the creditor, they ceaſe to be at his riſque and lie at the creditor's, who from being a creditor of a ſum of money, as he was before, is now become creditor of thoſe coins, *tanquam certorum corporum;* and he is a creditor no longer of his debtor, who has been fully diſcharged by the conſignation, but he is a creditor of the conſignee, who by the conſignation, obliges himſelf, *tanquam ex quasi contractu*, to reſtore the coins to the creditor, if the conſignation be judged valid, or to the debtor who conſigned them, if it be declared null.

Hence it follows that the appreciation or depreciation of the money ought to be to the profit or loſs of the creditor, if the conſignation be judged valid; for when the thing due is a thing certain, it is at the riſque of the creditor. If the conſignation be not judged valid, the debtor will take back the money as it may be.

In caſe of an appreciation of the money happening ſince

the conſignation, the creditor will not be received, in order to avail himſelf of this appreciation, to aſk to withdraw the money conſigned, and hold the conſignation to be null; for no one is to be received to argue againſt his own act. The formalities which the debtor might have neglected having been eſtabliſhed in favor of the creditor, he only has a right to complain, if they have not been obſerved.

There remains a queſtion, which is, whether, the conſignation having been regularly made and the debtor having voluntarily withdrawn the money conſigned by him, this conſignation ought to be regarded as of no effect with regard to the ſecurities and the co-obligors of the debtor; and whether therefore the ſecurities and co-obligors remain bound. For the negative it may be ſaid, that the conſignation, having been regularly made, has extinguiſhed the debt, and diſcharged all thoſe who were liable for it; that, the ſecurities and co-obligors having been once diſcharged, it cannot be in the power of the debtor, by withdrawing the money conſigned, to revive their obligation which has been extinguiſhed. An argument is drawn from the law *fin.* ff. *de pact.*, which decides that when the debtor has acquired to himſelf and his ſecurities, by the pact *de non petendo*, which has taken place between the creditor and him, a plea to the action of the creditor, he can no longer, in renouncing the pact by a contrary agreement, deprive his ſecurities of the plea they have acquired: *a fortiori*, ſay they, it ought not to be in his power to revive the obligation of his ſecurities, after they have been diſcharged *de jure* by the conſignation. It is added that as, after an actual payment which has extinguiſhed the debt, the voluntary reſtitution which the creditor might make to the debtor of the money he had paid, would not revive the debt; ſo, after the conſignation which is in lieu of the payment and has the ſame effect in extinguiſhing the debt, the reſtitution made to the debtor, of the money conſigned, cannot revive the debt. Notwithſtanding theſe reaſons, it has been adjudged in a caſe, 1624, reported by Baſſet, IV, 21, that the conſignation ſhould be holden as null, and that the ſe-

curities should remain bound. Basset gives for the reason of this decision, that the consignation which extinguishes the debt is not a momentary consignation, but a consignation *quæ in suo statu permanserit*, and which has not been withdrawn by the debtor who made it. But may it not be replied that this is begging the question? For it is precisely a question whether the debtor who has made a consignation according to law, may withdraw it to the prejudice of his securities. I should think we ought to distinguish whether the consignation has been withdrawn by the debtor before it was ordered or declared valid, or whether it has been withdrawn since. In the first case, I think that the consignation ought to be regarded as of no effect, and that the securities are not discharged: for the consignation not being in itself a payment, it is from the authority of the judge that it holds the effect which is equivalent to a payment and extinguishes the debt. The sentence of the judge which declares the consignation valid, has, I confess, a retroactive effect, and the consignation, confirmed by this sentence, is presumed to have extinguished the debt from the instant it was made; but a consignation, which has neither been ordered nor confirmed by the judge, and which the debtor has withdrawn, could not have the effect to extinguish the debt, nor to discharge, in consequence thereof, the securities, and it ought to be regarded as null. In the second case when the debtor has not withdrawn the monies by him consigned, until after the consignation has been declared valid, I do not think that this should prejudice the securities and co-debtors who have been discharged by this consignation.

CHAPTER II.

Of novation.

THIS chapter will be divided into six articles. We shall see in the first, what a novation is, and what are its different kinds. In the second we will treat of the

debts which ought to make a ground for novation: in the third, of the persons who may make a novation. In the fourth, how novation is made. In the fifth, of the effect of a novation. We will treat in the sixth of the effect of delegation, which is a particular kind of novation.

ARTICLE THE FIRST.

What a novation is and what are its different kinds.

546. Novation is the substitution of a new debt in the place of an old one.

The old debt is extinguished by the new one which is contracted in its place: therefore novation is reckoned among the ways in which obligations are extinguished.

547. Novation may be made in three different ways, which form three different sorts of novation.

The first is that which is made without the intervention of any new person, when a debtor contracts a new engagement with his creditor, on condition that he shall be discharged from a preceding one. This sort of novation is called simple novation.

548. The second sort of novation is that which is made by the intervention of a new debtor, when one becomes debtor in my place to my creditor, who accepts him for his debtor and discharges me in consequence thereof.

He who thus becomes debtor for another who is consequently discharged, is called in law *expromissor*; and this sort of novation is called *expromissio*. This *expromissor* is very different from the security whom they call in law *adpromissor*: for he who becomes a security for one, does not discharge him from his obligation; but he accedes to it and becomes debtor jointly with him.

549. The third sort of novation is that which is made by the intervention of a new creditor, when a debtor, in order to be discharged from an old creditor, by the order of this creditor, contracts some engagement with a new creditor.

There is a particular kind of novation which we call

delegation, which very often includes a double novation. We will treat of it in article VI.

We shall say nothing of that which results *ex litis contestatione*, the principles of the Roman law in this respect being no longer in use among us.

ARTICLE II.

Of the debts which make the necessary ground for novation.

550. It results from the definition which we have just given of novation, that there cannot be a novation unless there have been two debts contracted, of which one is extinguished by the other which is substituted to it.

Hence it follows that the debt of which one intends to make a novation by another engagement, is a conditional debt; the novation cannot take place till the condition happens. L. 8, §. 1, ff. *de novat.*

Therefore if the condition fails, there will be no novation; because there has not been a first debt to which the new one could be substituted.

Likewise, if the conditional debt of which one has intended to make a novation by another engagement, was of a thing certain, and before the accomplishment of the condition the thing should perish, there would be no novation, even when the condition should be accomplished: for the condition not confirming the debt of a thing which does not exist, there has not yet been a first debt to which the new one could be substituted.

551. *Vice versa*, if the first debt did not depend on any condition, but the second engagement by which one has intended to make a novation of this first debt, depends on a condition, the novation cannot be accomplished but by the accomplishment of the condition of the new engagement before the extinction of the first debt.

Therefore there will be no novation, not only in the case in which the condition should fail, but even in the case in which, before the accomplishment of this condition, the first debt should have been extinguished, *puta*, by the ex-

tinction of the thing which made the object of it; for the accomplishment of the condition cannot effect the novation of a debt which is no more. L. 14, ff. *de novat.*

552. The simple time of payment is very different from the condition: the debt exists, although the time of payment may not yet have arrived. Therefore one may make a novation of a debt whereof the time of payment has not yet arrived, by another absolute engagement; or of an absolute debt, by another which contains a time of payment; and in both cases the novation is accomplished at first, without waiting the arrival of the time. L. 5, L. 8, §. 1, ff. *de novat.*

553. It is indeed of the essence of a novation that there should have been two debts contracted; a first, and a second which has been substituted to it: but it suffices that the first has preceded the second for an imaginary moment. The novation of the first debt may be made by the second, in the same instant that the first is contracted.

For example. If you sell me an estate for the price of ten thousand livres, and by the same contract a third person engages in my place to pay you this sum, and you accept him for your only debtor, we must suppose for a moment, a debt which I contract for the price of the estate that I purchase, and of which novation is made by the engagement contracted by this third person to pay the price in my place. Although this debt which I contract has not existed a moment in reality, a novation of it is made in the same instant that I contracted it. See another example in the law 8, §. 2, ff. *de novat.*

554. The novation is valid, whatever may be the first debt to which a new one is substituted, and whatever that may be which is substituted. *Non interest qualis præcessit obligatio, seu civilis, seu naturalis; qualiscumque sit novari potest; dummodo sequens obligatio, aut civiliter teneat, aut naturaliter;* L. 1, §. 1, ff. *de novat.*

It is necessary however that these obligations be not such as the law formally condemns and declares null; for

what is null cannot be susceptible of any effect. See *supra*, *part.* 3, *ch.* 2.

ARTICLE III.

What persons may make a novation.

555. The consent which the creditor gives to the novation of the debt, being something equivalent, as to the extinction of the debt, to a payment which might be made of it, it follows that those only to whom one may validly pay, may make a novation of the debt.

Therefore, by the same reason that one cannot validly pay to a minor, to a feme covert not authorised by her husband, to one interdicted, we must decide that these persons cannot make a novation of what is due to them. L. 3. L. 20, §. 1, *de tit.*

556. *Vice versa*, he to whom one may pay a debt, may commonly also make a novation. *Cui recte solvitur, is etiam novare potest*; L. 10, ff. *de novat.*

It follows thence that a creditor *in solidum* may make a novation. So decides Venulius, L. 31, §. 1, ff. *de novat. & de leg.*, whose decision, it appears to me, ought to be followed, though Paul is of a different opinion. L. 27, ff. *de pactis.* The commentators have endeavoured in vain to reconcile them. See Willembach, *ad tit. de novat.* 10.

557. Likewise, a tutor, a curator, a husband may make a novation; L. 20, §. 1, L. *fin.* §. 1, ff. *de tit.* He who has a general power of attorney may also. He who has only a particular power to receive from the debtors may not, because, as his power is limited to receive, *non debet egredi fines mandati.*

It is the same with those who are called *adjecti solutionis gratia*, of whom we have spoken in a preceding chapter, *art.* 2, §. 4: they cannot make a novation, L. 10, ff. *de solut.*, although one may validly pay to them.

ARTICLE IV.

How novation is made.

§. I.

Of the form of a novation.

558. By the civil law novation could only be made by ſtipulation. The form of ſtipulation is not in uſe in our law. Simple agreements here have the ſame effect which ſtipulation had in the civil law; therefore novation is made by ſimple agreement.

§. II.

Of the intention to make a novation.

559. It is neceſſary for the novation that there ſhould have been an intention to make it in the creditor, or in the perſon who has power from him or capacity to make the novation in his place.

By the antient Roman law, this intention was eaſily preſumed; but according to the conſtitution of Juſtinian in the laſt law *Cod. de novat.*, this intention to make a novation ſhould have been expreſsly declared, without which there could not have been a novation; and the new engagement which is contracted, is preſumed to have been made rather to confirm the firſt and to accede to it, than to extinguiſh it.

The reaſon of this law is, that no one ſhould ſlightly be preſumed to give up the rights which belong to him. Therefore, as a novation includes an abdication which the creditor makes of the firſt debt, to which the ſecond is ſubſtituted, this novation ought not to be ſlightly preſumed, and the parties ought to explain themſelves.

We do not however adhere, in our juriſprudence, ſo literally to this law, that it ſhould always be neceſſary that the creditor declare in preciſe and formal terms that he intends to make a novation; it ſuffices, that his intention to make a novation ſhould, in ſome manner or other, appear ſo evident that it could never be called into doubt. This is

what d'Argentre eſtabliſhes, on the article 273 of the ancient cuſtom of Brittany.

For example. I am the creditor of Peter for the ſum of one thouſand livres; an inſtrument is paſſed between James, the debtor of Peter, and me, by which it is ſaid that James obliges himſelf towards me to pay me the ſum of one thouſand livres which is due me by Peter, and it is added that I intend, *in order to accommodate Peter*, to content myſelf with the preſent obligation which is made to me by James. We ought to decide in this inſtance that there was a novation and that Peter is diſcharged towards me, although it be not ſaid in formal and preciſe terms that I diſcharge Peter, and that I accept the obligation of James, in making a novation of that of Peter: for the terms which I have made uſe of, that I would *content* myſelf with the obligation of James *in order to accommodate Peter* declare ſufficiently that I intended to diſcharge Peter, and rely on James for my debtor in his place.

But unleſs it ſhould appear evident that the creditor had an intention to make a novation, the novation is not preſumed. Therefore if, in the ſame inſtance, having made a ſeizure and attachment upon James for the act of Peter, my debtor, James has bound himſelf to me abſolutely by an inſtrument of writing, to pay me the ſum of one thouſand livres which is due me by Peter and for which I have made ſeizure, without there being added, as in the above caſe, *that I intended, in order to accommodate Peter, to content myſelf with the obligation of James*, or ſuch other words from which it would be evident that I had intended to diſcharge Peter, I ſhall not be preſumed to have made a novation, and James will be holden to have acceded to the obligation of Peter who ſtill remains bound to me. It was ſo adjudged by the parliament of Toulouſe in a caſe reported by Catelan, *vol.* 2, L. 5, *ch.* 38.

Likewiſe, if ſince the debt was contracted, a new agreement has taken place between the creditor and the debtor, by which a longer time of payment may have been

given or a new place for the payment appointed, or the debtor allowed the liberty of paying to another perſon than the creditor, or to pay another thing in the room of that which was due, or even by which the debtor ſhould have bound himſelf to pay a larger ſum, or a leſs one to which the creditor was willing to confine his demand; in all theſe caſes and the like, according to our principle that the novation is not to be preſumed, it muſt be decided that there has been no novation and that the parties intended only to modify, diminiſh or augment the debt, rather than extinguiſh it in order to ſubſtitute a new one to it, if they did not explain themſelves.

§. III.

Whether an annuity to the amount of a ſum due by him who contracts it, eſſentially includes a novation.

When by an agreement between the creditor and debtor of a ſum of money, the debtor has contracted an annuity to his creditor, is there neceſſarily in this caſe a novation? Many hold that in this caſe there is no novation, when the parties have not mentioned it, and eſpecially when they have expreſsly declared in the contract that they did not intend to make a novation. They hold that by the contract the creditor gives no diſcharge of the ſum that is due him; that he only conſents not to exact the ſum that is due as long as the intereſt of that ſum is paid to him; conſequently that it is always the old debt which exiſts, although under a new modification; that is to ſay, that from being demandable as it was, it has now become a debt whereof the principal is alienated and cannot be exacted as long as the debtor pays the arrearages. This opinion appears to me to be liable to many objections. It is of the eſſence of the contract of annuity, which is a contract real or *in rem*, that he who contracts the annuity receive the price of the annuity. When my debtor of a certain ſum, as of a thouſand livres, contracts for that ſum an annuity of fifty livres, it is then neceſſary that he receive the ſum of a thouſand livres as the price of the annuity which he

contracts, and he can only be holden to have received it by the discharge which I give in payment of the annuity he contracts. This contract of annuity includes then a discharge which I give him of that sum: it includes a compensation of the debt for the sum which he owed me, with a like sum which I was obliged to give him as the price of the annuity he contracts. Hence it is evident that this discharge and this compensation extinguish the debt and form a novation.

It cannot be said that the principal of the annuity which is contracted, is the old debt of a thousand livres due by Peter, which continues to exist under a new modification of the principal of the annuity, instead of the debt demandable as it was: for besides that it is extinguished by the contract of annuity as we have just now shewn, the debt of an annuity is properly the debt of the arrearages, which will run forever till the redemption, rather than of the principal, which, as it cannot be exacted, is not properly due, and is *in facultate luitionis, magis quam in obligatione.*

These reasons appear conclusive in determining that the contract by which the debtor of a certain sum contracts an annuity to his creditor for that sum, essentially includes a novation, even though it should be expressly mentioned that the parties intend not to make a novation; for a protestation cannot prevent the natural and essential effect of a contract. Therefore it appears to me that this clause cannot have any other effect than to prevent the extinction of the hypothecations for the former debt, and transfer them to the new, as may be done according to the law 12, §. 6, ff. *Qui potior.*

Although these reasons appear to me very strong to determine that the contract by which a demandable debt is converted into a contract of annuity, essentially includes a novation, yet the contrary opinion seems to be advocated by most authors. They ground it on two cases decided, which they say have settled the question. The first, which

is of the 13th April, 1783, is reported in *Journal de Palais*, *vol.* 2, *ed. fol.*

In this case Ligondez, a debtor *in solidum* with Sablon of the sum of six thousand livres, afterwards contracted an annuity as well in his own name as in acting for Sablon. The creditor brought a suit against Sablon to compel him to enter into a contract of annuity or pay the said sum of six thousand livres, and judgment was given for the plaintiff. The reporter infers from this case that it was adjudged, that a debtor of a sum of money might contract an annuity for that sum without a novation of the debt taking place. But I think the consequence is badly drawn, and that the respective pleas of the parties which are reported in the journal did not bring this question before the court. The reason for which judgment was given against the debtor to pay or contract the annuity, appears to me to have been this, that as Ligondez contracted the annuity as well in his own name as in acting for Sablon, and as the plaintiff therefore consented to the conversion of his claim of six thousand livres, into an annuity under the condition that it should be contracted by both the debtors; the conversion of the debt of six thousand livres into an annuity, the novation and the extinction of the claim which was to result from it, depended on this condition: therefore on the refusal of Sablon to contract the annuity, the condition failed and there was no novation; the debt continued and judgemnt was rightly given for the plaintiff. The other case is of the 6th September 1712, and is reported in *vol.* 6, *Journal des Audiences*. In this case several persons were bound *in solidum* to pay a certain sum: two had actually paid each a third part, and the creditor, in receiving it, had reserved his right against each for the whole. Lebegue and de Villemenard had, by a note, promised to contract an annuity for the remaining third and it was expressed in the note that this should not impair the creditor's right against the others as to their liability for the whole. A long time after, the creditors brought a suit against Montpensier,

one of thoſe who had paid his third under the above reſervation, to compel him to pay the remainder or to accede to the contract of annuity, and judgment was rendered to this effect. Therefore it is ſaid to have been adjudged that a contract of annuity, made by a debtor for the ſum which he owed, did not neceſſarily include a novation and an extinction of the debt of this ſum: otherwiſe, in the preſent caſe, Montpenſier, debtor *in solidum* of the ſums which remained due and for which the annuity was contracted, would have been diſcharged from this debt by the annuity, and would not have been condemned by the judgment to pay it.

I do not know what were the reaſons upon which this judgment was grounded; but in order to ſupport our principles, it might be ſaid that the judgment has not determined what is inferred; but that it has determined that, by the reſervation, the creditor was reputed to have made the converſion of his claim into an annuity dependent on the condition, that all the debtors *in solidum* would accede to the contract of annuity, and that conſequently on the refuſal of Montpenſier to accede to it, the condition failed, and the debt continued in force.

§ IV.

Of the neceſſity that there ſhould be ſome difference between the new and the old debt.

560. When there is a new agreement between the ſame creditor and the ſame debtor without the intervention of any new perſon, although it be expreſsly declared by the inſtrument which contains the new engagement that the parties intend to make a novation, it is neceſſary, in order that the novation may be valid, that this inſtrument contain ſomething different from the firſt obligation which was contracted; whether in the quality of the obligation, if the firſt was determinate, and the ſecond in an alternative, or *vice versa*; or whether in regard to the accidental acceſſories of the obligation, as the time or place of payment. It is alſo a ſufficient difference if the firſt obli-

tion was contracted under the securitiship of another person, or under the hypothecation of my goods, and by the new one I have bound myself without a security and without hypothecation, or *vice versa*.

If the new engagement made without the intervention of a new person, does not contain any thing different from the first, it is evident that this new engagement is ineffectively contracted. *Instit. tit. quib. mod. toll. obl.* §. 4.

561. When the novation is made with the intervention of a new debtor or of a new creditor, the difference of creditor or debtor is a sufficient difference to render the novation effective, without the necessity of any other intervening.

§. V.

Whether the consent of the old debtor is necessary for the novation.

562. The novation which is made by the intervention of a new debtor, may be made between the creditor and this new debtor, without the first, whose debt is to be extinguished by the novation, having any part in it, and without his consenting thereto. *Liberat me is qui quod debeo promittit, etiamsi nolim;* L. 8, §. 5, *de novat.* The reason is, that the novation, in regard to the first debtor, includes nothing else than the discharge of his debt, by the novation which this third person contracts in his place: one may discharge the debt of another without his consent thereto, as we have seen in a preceding chapter: *Ignorant is enim et inviti conditio melior fieri potest.* L. 53, *de solut.*

ARTICLE V.

Of the effect of novation.

563. The effect of a novation is that the first debt is extinguished in the same manner that it would be by an actual payment.

When one of several debtors *in solidum* contracts alone a new engagement with the creditor in order to make a no-

vation of the firſt, the firſt debt being extinguiſhed by the novation as it would be by an actual payment, all his co-debtors are diſcharged as well as himſelf. Likewiſe as the extinction of the principal obligation carries with it that of all the acceſſory obligations, the novation which is made of the principal debt extinguiſhes all the acceſſory obligations, ſuch as that of ſecurities.

If the creditor wiſhed to preſerve the obligation of the other debtors and ſecurities, it is neceſſary that he ſhould annex a condition to the novation, that the co-debtors and ſecurities ſhould accede to the new debt; in which caſe, if they were not willing to accede to it, there would be no novation, and the creditor would preſerve his old debt.

From the principle that a novation extinguiſhes the old debt, it follows alſo that it extinguiſhes the hypothecations which were acceſſory to it. *Novatione legitime facta liberantur hypothecæ*; L. 18, ff. *de novat.*

But the creditor may by the ſame act which contains the novation, transfer to the ſecond debt the hypothecations which were attached to the firſt. L. 12, §. 5, ff. *qui potior.*

For example. If by a writing between us of one thouſand ſeven hundred and fifty you have borrowed from me the ſum of a thouſand livres under the hypothecation of your property, and by another of one thouſand ſeven hundred and ſixty you have contracted towards me a new obligation, and it is expreſſed in this laſt that by the means of this new obligation you ſhould reſt diſcharged from that of one thouſand ſeven hundred and fifty, *of which the parties have intended to make a novation under the reſerve of the hypothecations*, I ſhall, by this clauſe, be continued in my order of hypothecation for my new debt, from the day of the date of the old one. L. 3. L. 21. ff. *dicto titulo.*

Obſerve that if the new debt was greater than the old, I ſhould not be continued in my order of hypothecation, except to the amount of the ſum which was due me by the inſtrument of one thouſand ſeven hundred and fifty; this transferring of the hypothecations from the old debt to the

new one, not being allowed to prejudice intermediate creditors.

Obſerve alſo that this transferring of the hypothecations from the old debt to the new, cannot be made but with the conſent of the perſon to whom the things hypothecated belong. In the inſtance above mentioned, it is clear that you have conſented to this transferring of the hypothecation, ſince you were party to the inſtrument in which the reſervation of the hypothecation is ſtipulated. But if a third perſon by a deed of one thouſand ſeven hundred and ſixty is obliged towards me to pay me the ſum which you owed me by a deed of one thouſand ſeven hundred and fifty, and it be ſaid that by means of the premiſes, the debt of one thouſand ſeven hundred and fifty remains diſcharged, *under the reserve of the hypothecations*, although the novation may be made without your intervention in the deed, the transferring of the hypothecation of your property attached to your debt of one thouſand ſeven hundred and fifty cannot be made to the new debts of one thouſand ſeven hundred and ſixty, if you are not a party to the deed to conſent to it; the new debtor to whom the things hypothecated do not belong, cannot without you, to whom they do belong, hypothecate them for the new debt. This is what Paul decides in the law 30, ff. *de novat.* ***Paulus respondit, si creditor a Sempronio, animo novandi stipulatus esset, ita ut a priore obligatione in universum discederetur, rursum easdem res a posteriore debitore, sine consensu debitoris prioris, obligari non posse.***

According to the ſame principles, if one of ſeveral debtors *in solidum* contracts towards the creditor a new obligation, and it be expreſſed in the deed, that the parties have intended to make a novation of the firſt debt, *under the reserve of the hypothecations*; the reſerve can only have effect as to the hypothecations of the property of this debtor who contracts the new debt, and not the hypothecation of the property of his co-debtors; as their property cannot be hypothecated for this new debt without their conſent.

Whatever reserve the creditor should make by the deed which contains the novation, the securities of the old debt cannot be obliged to the new one, if they do not consent to it.

ARTICLE VI.

Of delegation.

§. I.

What delegation is, and how it is made.

354. Delegation is a kind of novation by which the old debtor, in order to discharge himself from his creditor, gives him a third person who obliges himself in his place towards this creditor, or towards the person whom he indicates to him. *Delegare est vicè sua alium reum dare creditori, vel cui jusserit.* L. 11, ff. *de novat.*

It results from this definition, that a delegation is made by the concurrence of three persons, and that there intervenes sometimes a fourth.

It is necessary that there should be the concurrence, I. of the person delegating, that is to say, of the old debtor who gives to his creditor another debtor in his place.

II. Of the person delegated, who obliges himself towards the creditor in the place of the old debtor, or towards the person indicated by the creditor.

III. Of the creditor, who in consequence of the obligation which the person delegated contracts towards him or towards the person whom he indicates to him, discharges the person delegating.

Sometimes there intervenes in the delegation a fourth person, viz. the one whom the creditor indicates, and towards whom, upon the indication of the creditor, and by the order of the person delegating, the person delegated binds himself.

In order that there may be a delegation, it is necessary that the will of the creditor to discharge the first debtor, and to content himself with the obligation of this new debt-

or, who obliges himself towards him in the place of the first, should well appear. Therefore if Peter, one of the heirs of my debtor, in order to discharge himself from an annuity towards me, has, by a division, charged James, his co-heir, to pay it to me in his discharge, there will be no delegation; and Peter will not be discharged towards me, if I have not, by some deed, declared formally that I discharged Peter: without this, although I have received from James alone the arrearages during a considerable time, it cannot thereby be concluded that I have accepted him for my only debtor in the place of Peter, and that I have discharged Peter; *arg.* L. 40, §. 2, ff. *de pact.*

§. II.

Of the effect of delegation.

565. The delegation includes a novation, which is the extinction of the debt of the person delegating; and the obligation which the person delegated contracts in his place. Commonly indeed the delegation contains a double novation; for commonly the person delegated is a debtor of the person delegating, who, in order to discharge himself, towards the person delegating, of his obligation, contracts, by the order of the person delegating, a new obligation towards the creditor of the person delegating. There is in this case a novation, both of the obligation of the person delegating towards his creditor to whom the person delegating gives another debtor in his place, and also of the obligation of the person delegated towards the person delegating, in consequence of that which he contracts by his order towards his creditor.

566. If the person delegated was not the debtor of the person delegating, although he bound himself to his creditor only on the false supposition that he was debtor of the person delegating, the obligation he should contract with this creditor would, not the less, be valid, and he could not avoid paying it; saving his recourse against the person delegating, that he might be compelled to reimburse him. The creditor who, by the obligation which the person dele-

gated contracts towards him, receives only what was due him by his former creditor whom he has discharged, ought not to suffer by this error. *Si per ignorantiam promiserit, nulla quidem exceptione uti poterit adversus creditorem, quia ille suum recepit; sed is qui delegavit, tenetur conditione;* L. 12, ff. *de novat.*

It would be otherwise if he towards whom the person delegated bound himself, was not creditor of the person delegating, either if the person delegating was himself in the error and thought himself debtor, or if he wished to make him a donation. In either case, the person delegated who bound himself to him through error, in the false supposition that he was debtor of the person delegating, will not be validly bound, and will be able to defend himself from paying, on discovering the error; L. 7, ff. *de dol. excep.*; L. 3, §. 4, ff. *de novat.*

The reason of this difference is, that in this case, he towards whom the person delegated bound himself, *certat de lucro captando;* whilst the person delegated, who through error bound himself to him, *certat de damno vitando.* He is more entitled to favor *qui certat de damno*, than he *qui certat de lucro.* Therefore he ought not only to be discharged from his obligation contracted through error, but also to recover back what he may have paid in consequence thereof, according to this rule of law, *Melius est favere repetitioni, quam adventitio lucro.* On the contrary, in the preceding case, the creditor to whom the person delegated bound himself, *versaretur in damno*, would sustain a loss, if the person delegated was discharged from his obligation.

567. If the person delegated binds himself only under a condition, all the effect of the delegation will be suspended until the condition be performed, and as in this case it depends on the performance of the condition, that the person delegated should be bound, so it depends on the performance of the same condition that the person delegating be discharged from his obligation, which can only be extinguish-

ed by the new obligation of the perſon delegated, which is to be ſubſtituted to it. The obligation of the perſon delegated to the perſon delegating, depends likewiſe on this condition; for the perſon delegated can only be diſcharged from his obligation to the perſon delegating, by becoming bound to the creditor in his ſtead.

Although the perſon delegated be not diſcharged from his obligation towards the perſon delegating, until the performance of the condition, yet the perſon delegating, by whoſe order he conditionally bound himſelf, cannot proſecute him till there be a failure in the performance of the condition; for as long as it may be performed, it is uncertain whether he will remain bound to him, or whether he will become bound to the new creditor; this is the deciſion of the law 36, ff. *de reb. cred.*

§. III.

Whether the perſon delegating is liable for the inſolvency of the perſon delegated.

568. Regularly, when the perſon delegated is validly bound to the creditor to whom he has been delegated, the perſon delegating is fully diſcharged from his obligation to this creditor, who can have no recourſe againſt him in caſe the new debtor delegated to him ſhould become inſolvent; this creditor, in accepting the delegation, has relied on the ſolvency of the debtor who was delegated to him; *nomen ejus ſecutus eſt.*

This principle is liable to an exception in the caſe in which it ſhould be agreed that the perſon delegating ſhould give *at his own riſk* a new debtor in his ſtead. Paul decides that in this caſe the creditor may proſecute, *actione mandati contraria*, the perſon delegating, in order to be indemnified for the ſum for which he could not procure payment, on account of the inſolvency of the new debtor delegated to him. For when at the requeſt of my old debtor, I accept at his riſk another debtor in his ſtead, it is a contract of *mandate* which intervenes between us. I am his mandata-

ty in accepting the delegation, and consequently ought to be indemnified by him for what this acceptance may cost me. It costs me the sum which I could not obtain from the person delegated; for this therefore he ought to indemnify me.

Observe that it is necessary that I should not be subject to be reproached for having neglected to use the diligence which might have procured my payment, whilst the debtor delegated was solvent; for in that case it is my own fault if I have not been paid. According to the rules of the contract of mandate, the mandatary has only an action to be indemnified for what it has cost him without his fault. *Venit in actione mandati quod mandatario ex causa mandati abest sine culpabiliter.*

As it is not the delegation of itself, but the contract of mandate which is supposed to have taken place between the person delegating and the creditor, which renders the former responsible for the insolvency of the debtor delegated, it is for the creditor who claims to avail himself of this contract of mandate, to prove by some writing that it has intervened and that he has only accepted the delegation at the risk of the person delegating. Such an agreement is not presumed; it was thus determined in a case reported by Bouvot.

Cujas *ad* L. 26, §. 2, ff. *mand. ad libr.* 33, *Paul. ad edict.*, adduces a second exception to this principle, that although the delegation was not made on the condition that it should be at the risk of the person delegating, yet if, at the time of the delegation, the debtor delegated was insolvent, and his insolvency was unknown to the creditor, the person delegating ought to be answerable for it. This opinion of Cujas is grounded on equity. The delegation includes, between the person delegating and the creditor, a contract of the kind of those which are contracts of interest on both sides, in which each intends to receive as much as he gives. The equity of these agreements consists in their equality; they are iniquitous when one of the parties gives much and re-

deives little in its place. According to these principles the delegation which you make to me of the sum of one thousand livres due you by Peter an insolvent person, in the room of a like sum which you owe me, is manifestly iniquitous; for by this delegation you receive the discharge of your debt of one thousand livres, which discharge is of the real and actual value of a thousand livres, and for this value of one thousand livres, which you receive of me, you give me a claim on an insolvent debtor, which is of no value or almost of none: It is therefore necessary, in order to repair the iniquity of the agreement, that you should be answerable to me for the insolvency of this debtor, whom I accepted through error for my debtor in your stead.

It would be otherwise if at the time of the delegation which you made me of this debtor in your stead, I had knowledge of his insolvency. The delegation in this case does not include a contract of the kind of those which are of interest on both sides; but it includes a beneficence which I have been willing to exercise towards you by accepting this debtor however insolvent, in your stead. You have done me no injury, since knowing this, I was willing to accept him: *volenti non fit injuria.*

Despeisses rejects the opinion of Cujas, and contends that unless it be expressly agreed that the person delegating delegates at his risk, *suo periculo*, the creditor can never complain of the insolvency of the debtor who was delegated to him, and whom he was willing to accept, notwithstanding any ignorance he may plead. His reason is, that otherwise the delegation would never have the effect of discharging the person delegating, which is the effect which it ought from its nature to have, since the creditor would always pretend that he was ignorant of the insolvency of of the debtor who was delegated to him.

These reasons may cause the opinion of Cujas to be rejected *in foro legis*; but it appears to me unquestionable *in foro conscientiæ.*

§. IV.

Difference between delegation, transfer, and simple indication.

569. It remains for us to observe that delegation differs from a transfer, as well as from simple indication.

The transfer which a creditor makes to another of his claim, includes no novation. It is the same claim that passes from the transferor to the transferee, who indeed is, properly speaking, only a procurator *in rem suam* of the creditor who cedes it to him. Besides this transfer passes only between two persons, the transferor and transferee, without there being any occasion for the intervention of the consent of the debtor.

We have treated of the transfer in our treatise on the contract of sale, *part* 6, *ch.* 3.

The novation differs also from simple indication.

When I indicate to my creditor a person from whom he shall receive the payment of the sum which I owe him, and on whom I give him an order to this effect, this includes only a simple mandate. It includes neither a transfer nor a novation; I still remain the debtor of my creditor; the person whom I indicate to him and on whom I give him an order, does not become his debtor in my stead.

Likewise, when a creditor indicates to his debtor a person to whom he may pay, this indication includes no novation; the debtor does not become a debtor of the person indicated to him, but remains always a debtor of the same creditor. See, on this kind of indication, *supra*, *ch.* 1, *art.* 2, §. 4.

CHAPTER III.

Of the release of a debt.

570. The release which the creditor makes of the debt, is also one of the ways in which obligations are extinguished; for it discharges the debtor *de jure*.

the contrary; but if he alledges that the creditor has releaſed to him the debt, his poſſeſſion of the note is not of itſelf ſufficient, and he ought to prove that the creditor has intentionally releaſed to him and rendered up his note; becauſe the releaſe is a donation which is not to be preſumed, according to this rule, *Nemo donare facile præsumitur*; and beſides that it is an agreement which ought, according to the ordinance, to be eſtabliſhed by writing. I do not think this diſtinction ſolid. I think we ought to decide without diſtinction that the poſſeſſion of the note by the debtor ſhould make it preſumable that it has been rendered to him by the creditor, either as diſcharged or as releaſed; unleſs the creditor proves the contrary, *puta*, that the note has been ſtolen from him. In vain may it be ſaid that the donation is not to be preſumed; for this ſignifies that it is not ſlightly to be preſumed, and without a ſufficient ground for ſuch preſumption. According to the law cited, there is a ſufficient ground to preſume the donation and the releaſe of the debt, when the creditor has releaſed the note to the debtor; and the poſſeſſion of the note by the debtor ought alſo to make it preſumable that the creditor has returned it to him, ſince this is the natural way by which the poſſeſſion of it has paſſed from the creditor with whom it was, to the debtor. The agreement drawn from the ordinance which directs that agreements, the object of which exceeds one hundred livres, ſhould be proved by writing, is not better. The ordinance intended only to exclude proof by witneſſes, and not preſumptions reſulting from facts avowed by the parties.

The diſtinction of Boiceau upon the quality of the debtor is more plauſible. If the debtor was the factor of the creditor, or other domeſtic who had it in his power to take the note, the poſſeſſion which he ſhould have of the note would not be a ſufficient preſumption, either of the releaſe or of the payment of the debt. *Idem*, if it was a neighbour to whoſe houſe the creditor had carried his effects, in the caſe of fire.

What is decided in regard to a note or obligation before a notary, ought not to extend to an engroſſed copy of a contract of annuity, or of an obligation of which there is a minute. Although this engroſſed inſtrument is found in the hands of the debtor, there does not reſult therefrom a ſufficient preſumption of the payment or the releaſe of the debt, unleſs other circumſtances concur: for the copy which remains with the notary and which is not diſcharged, reclaims the debt in favor of the creditor, from whom the engroſſed inſtrument has been ſtolen, or who, truſting to the copy, has parted with it and confided it to the debtor.

574. The reſtitution which the creditor has made to the debtor of the things which he has given him in pledge for his debt, cauſes neither the releaſe nor the payment of the debt to be preſumed. L. 3, ff. *de pact.*: for he has only intended by this to releaſe to him the pledge, and not to releaſe to him the debt.

575. A creditor is preſumed to have releaſed the liability *in ſolidum* of the debtors *in ſolidum*, when he has admitted them to pay only their part. See *ſupra*, *n.* 277, *& ſeq.*

576. When after a ſynallagmatic contract made between us, before it has been performed on either part, a new agreement takes place between us, by which it is ſaid that I diſcharge you from this contract, you are preſumed tacitly to have diſcharged me from the reciprocal obligation which I have contracted towards you. For example. If after you have ſold me a thing, we agree that I diſcharge you from the ſale which you have made to me, you are preſumed likewiſe to have diſcharged me from my purchaſe. L. 23, ff. *de accept.*

577. The omiſſion to reſerve a debt, in the acquittance which the creditor gives of another debt, forms no preſumption of the releaſe of the debt of which there has not been a reſervation. L. 23, ff. *de oblig. & act.*

Likewiſe, if in an account between two parties who had dealings together in trade, one of them has not compriſed an article of debt which he had againſt the other, there refults no preſumption of the releaſe of this debt: it will be preſumed on the contrary that it was an omiſſion made by forgetfulneſs, which ſhould not prevent the creditor from exacting his debt, notwithſtanding the account in which it has not been compriſed.

Yet there may reſult a preſumption of the releaſe of a debt not compriſed in the account, when three circumſtances concur. I. When the creditor and the debtor were united by the ties of blood or ſtrict friendſhip; II. when it is not made for a ſingle account between the parties, but ſeveral, in neither of which the debt has been compriſed; III. when the creditor is dead without having demanded it. From the concurrence of theſe three circumſtances, Papinian derives a preſumption ſufficient to releaſe the debt. This is the decifion of the celebrated law *Procula*, 26, ff. *de probat.*

§. III.

Whether the release may be made by the single will of the creditor without an agreement.

578. We have ſeen that the releaſe of a debt may be validly made by an agreement expreſſed or tacit, between the creditor and the debtor. Some authors think that it may be made by the ſingle will of the creditor who ſhould declare that he makes the releaſe, provided he ſhould be capable of diſpoſing of his property. This is the opinion of Barbeyrac in his notes on Puffendorf. His reaſon is that every one who has the diſpoſal of his property may by his ſingle will renounce the rights which belong to him, and that he loſes them in renouncing them. Paul, in law 2, §. 1, ff. *pro derel.*, decides expreſsly that one may by his ſingle will renounce and loſe the right of property in a thing corporate which belongs to him. For the ſame reaſon we may by our ſingle will renounce the right of a claim which we have againſt a debtor; and as there cannot be any debt

without a claim by him towards whom it has been contracted, the renunciation and abandonment which the creditor makes of his claim, neceſſarily draws after it the extinction of the debt. According to theſe principles, if a creditor at Orleans has written to his debtor at Marſeilles a letter, in which he mentions to him that he has releaſed to him his debt, although the debtor be dead ſince the writing of the letter, but before it had reached him, ſo that one could not ſay that any engagement took place between the creditor and him, yet according to the principles of Barbeyrac, it muſt be decided that the debt is extinguiſhed, and that the creditor who has by this letter declared his intention to renounce his debt, is not to be received to demand it from the heirs of the debtor.

I do not think that the opinion of Barbeyrac can be followed in practice. I would willingly agree with him that, in ſuppoſing an abſtract caſe, a creditor who ſhould have an abſolute intent to abdicate his claim, might by his ſingle will extinguiſh it; but when a creditor declares that he makes a releaſe to his debtor of his debt, it is not this abſolute will to renounce his claim which we ought to ſuppoſe in him, but rather the intention to make of it a donation to his debtor. Therefore, as every donation requires the acceptance of the donee, we ought to think that this creditor only intended to abdicate his right when the releaſe and the donation which he was willing to make to his debtor ſhould receive their perfection by the acceptance of his debtor. Therefore, in the inſtance propoſed, I think ought to decide, contrary to the principle of Barbeyrac, that the releaſe of a debt expreſſed by a letter ought not to have any effect, if the debtor to whom the releaſe may have been made, is dead before the letter reached him. Admitting even that the principle of Barbeyrac ought to be followed, this could only be when the releaſe is abſolute: when it is made under certain conditions, it is evident that it cannot have effect before the debtor has accepted the conditions.

§. IV.

Whether the release may be made for a part.

579. The releaſe of a debt may be made for the whole or for a part. The civil law excepted, in regard to the acceptilation, the caſe in which the thing was not ſuſceptible of parts. For example. If I had obliged myſelf towards you to impoſe upon my eſtate a certain right of way for the benefit of yours, the acceptilation of this debt could not be made by parts; L. 13, §. 1, ff. *de acceptil.* But among us nothing prevents a like debt from being releaſed for a part, as for the half, third, &c. and the effect of this releaſe will be that you can not exact from me this right of way without making me ſatisfaction for the moiety of the price or for the third.

ARTICLE II.

Of the different kinds of release.

We may diſtinguiſh two different kinds of releaſe which a creditor may make of his debt; one which we call a releaſe *rei*, the other which we call a diſcharge *personæ*.

§. I.

Of the release rei.

580. The releaſe *rei* is when the creditor declares that he holds the debt to be diſcharged, or when he gives an acquittance of it, as if he had received payment; although he had not received it.

This releaſe is equivalent to payment, and makes the thing no longer due; and conſequently it diſcharges all thoſe who were debtors of it; as there can be no longer debtors when there is nothing due.

§. II.

Of the discharge perſonæ.

581. The releaſe or diſcharge *personæ* is that by which the creditor ſimply diſcharges the debtor of his obligation. This diſcharge *magis eximit personam debitoris ab obligatione, quam extinguit obligationem:* it only extinguiſhes the debt

indirectly, in the caſe in which the debtor to whom it ſhould be granted, ſhould be the only principal debtor; becauſe there cannot be a debt without a debtor.

But if there are two or ſeveral debtors *in solidum*, the diſcharge granted to one does not extinguiſh the debt; it diſcharges him only to whom it is granted and not his co-debtor. The debt is extinguiſhed however for the part of him to whom the diſcharge is granted, and the other remains bound only for the ſurplus. The reaſon is, that if each owed the whole, this was only on condition that the creditor ſhould grant to him his rights and actions againſt the other. The creditor having put it, by his own act, out of his power to cede them againſt him whom he has diſcharged, the other ought not to ſuffer therefor, as we have ſeen *ſupra*, *n.* 520, *page* 67. The diſcharge granted to the principal debtor carries with it that of his ſecurities; for he would be ineffectually diſcharged if his ſecurities were not: ſince his ſecurities, being obliged to pay, would have recourſe againſt this debtor; beſides there cannot be a ſecurity without a principal debtor. This rule receives however a ſort of exception in regard to contracts of compoſition, *ſupra*, *n.* 380.

Contra, vice versa, the diſcharge granted to the ſecurity, does not diſcharge the principal debtor: for the obligation of the ſecurity depends entirely upon that of the prinpal debtor, but that of the principal debtor does not depend upon that of the ſecurity. There cannot be a ſecurity without a principal debtor, but there may be a principal debtor without a ſecurity.

The diſcharge *personæ* granted to a ſecurity, does not any more diſcharge his co-ſecurities. L. 25, ff. *de pact.* L. 15, §. 1, ff. *de fidejuss.* Yet if the ſecurities could have counted upon the recourſe which they would have in paying, againſt this ſecurity whom the creditor has diſcharged, having contracted their ſecuritiſhip with him, or after, it is equitable that the diſcharge granted to this ſecurity ſhould diſcharge them, as to the part for which, in paying, they would have

had recourſe againſt this ſecurity if he had not been diſcharged. The creditor not having power, in diſcharging this ſecurity and depriving them of this recourſe, to prejudice them, they may in this caſe oppoſe, for this part, to the creditor, the plea *cedendarum actionum*, as we have ſeen, *ſupra*, *n.* 520.

This deciſion, that the diſcharge granted to a ſecurity, neither diſcharges the principal debtor nor the co-ſecurities, applies even when the creditor had received a ſum of money from the ſecurity for his diſcharge from the ſecuritiſhip. This principal debtor will not therefore be diſcharged from any thing; for this ſum is not given in payment and to come in deduction of the debt, but it is given for the price of the diſcharge from the ſecuritiſhip.

§. III.

Whether the creditor may lawfully receive any thing from a ſecurity for his diſcharge, without applying it to the debt; and ſeveral queſtions which depend hereon.

582. What we have juſt ſaid brings us to the celebrated queſtion, whether, when a perſon has become a ſecurity towards me, for a debtor to whom I have lent a ſum of money, I may not only in *foro legis*, but alſo in *foro conſcientiæ*, receive ſomething from the ſecurity for his diſcharge from the ſecuritiſhip, and exact afterwards from the principal debtor the entire ſum which I have lent him, without allowing him what I have received from the ſecurity. Dumoulin in his treatiſe on Uſury, 9, 34, decides that I may lawfully do ſo, provided that when I diſcharged the ſecurity there was room to apprehend the inſolvency of the principal debtor. I do not commit in ſo doing any uſury; for uſury conſiſts in receiving ſomething beyond the ſum loaned, as the price and reward of the loan; it conſiſts in making a gain for a ſervice which ought to be gratuitous; but in this caſe the ſum which I have received from the ſecurity, and which I retain beſides the ſum that I loaned, which has ſince been paid to me in full, is not a ſum which I receive as the price and reward of the loan I made; I have received it for quite a different cauſe. The

riſque of the inſolvency of the debtor which was to be feared, was a riſque that was to fall on the ſecurity and not on me. I am willing to take this riſque on myſelf, and diſcharge the ſecurity from it. I am not obliged to do it for nothing. This riſque is appreciable and I may lawfully receive a ſum of money as the price of this riſque. *Finge.* I was creditor of Peter for the ſum of twelve thouſand livres; you were his ſecurity. The affairs of Peter were on a decline; there was room to fear that he would not be able to pay ten ſhillings in the pound. This riſque was yours. You offer me three thouſand livres to take that riſque on myſelf, in diſcharging you from your ſecuritiſhip. I accept your offer. It happens afterwards that the affairs of Peter take a better turn, and he pays me in full. I gain the three thouſand livres which I received from you. This gain is quite lawful; it is the price of the riſque which I have been willing to run, in your place, of loſing ſix thouſand livres and perhaps more. The principal debtor has no room to complain, nor have you. The principal debtor cannot; for he has paid only what he owed and no more: nor can you complain, for if you have given me three thouſand livres above the ſum that was due me, I have given you an equivalent for it, by taking on myſelf, in your ſtead, the riſque of loſing ſix thouſand livres or more. It is an aleatory contract that has intervened, which is as lawful as a contract of inſurance. It will be ſaid, perhaps, that it is a principle in matters of loan, that the riſque of the inſolvency of the debtor cannot give a right to the creditor to receive any thing beyond the principal ſum that is due him. I anſwer that this principle is true only with regard to the debtor. The riſque that the creditor runs of loſing the money he lends him, by his inſolvency, cannot give him the right to exact from him any thing beyond this ſum; becauſe to the debtor this overplus would be an abſolute loſs; he receives nothing for it: his poverty ought to be a reaſon that he ſhould be favored rather than charged. But the riſque of the inſolvency of the debtor may give a right to the creditor to receive ſomething from

a third perſon who has undertaken this riſque, when the creditor takes it on himſelf, in his ſtead; for this third perſon receives ſomething for what he gives, viz. a diſcharge from the riſque.

When there is no room to apprehend the inſolvency of the debtor, Dumoulin in this caſe, decides, *ibidem*, that the creditor cannot lawfully receive any thing from the ſecurity to diſcharge him from the ſecuritiſhip. It may be objected to this opinion, that the right which I had againſt the ſecurity was a right that was in *bonis*, which made part of my property. I give him this right when I diſcharge him; why may I not be permitted to receive ſomething from him in the place of what I give him? I anſwer that according to the rules of commutative juſtice, I cannot exact in the place of the thing which I have given, more than the equivalent of this thing, that is to ſay, more than the amount to which it is appreciable. If it be appreciable to nothing, I cannot exact any thing for it. Such is, in this caſe, the right which I had againſt the ſecurity and of which I have made him a gift and releaſe. *Finge.* I have a good claim againſt Peter for one thouſand piſtoles; there is no room to fear his inſolvency: he has real property to the amount of ten times that ſum, which is hypothecated for my claim. You were his ſecurity. I diſcharge you from your ſecuritiſhip: to how much can the right which reſulted from this ſecuritiſhip be appreciated? My claim, with all the rights that reſulted from it, was worth one thouſand piſtoles and no more; without the ſecuritiſhip from which I have diſcharged you, my claim is ſtill worth the full ſum of one thouſand piſtoles; ſince it is well ſecured: conſequently the right which I have given up to you is not appreciable to any thing; in giving it I ſuffer no diminution in my property, and conſequently I cannot lawfully receive any thing for it.

Obſerve that when a ſecurity has given ſomething to the creditor to be diſcharged from his ſecuritiſhip, it ought to be preſumed *in foro legis* that there was room to fear

the insolvency of the debtor; for one is not presumed to give without cause; *Nemo res suas jactare facile præsumitur.*

Although it should be fully proved that there was no room to fear that the debtor would become insolvent, when the security gave money to be discharged from his securitiship, the security, in the case in which the debt was not yet discharged, would not have the right to recall what he has given, except under offers to become and continue bound as he was before the discharge which has been given to him. *Molin. ibidem.*

The security may also in this case offer to pay the debt, in applying and deducting what he has given, without cause to be discharged from his securitiship; and if it was an annuity for which the security was given, this application should be made first upon the arrearages which are due, and afterwards upon the principal. He may, in making the payment, exact the subrogation to the rights of the creditor; for although he has been discharged, he ought not to be regarded as an entire stranger, since he makes the payment in order to procure for himself a satisfaction for what he has already given to be discharged. *Molin. ibidem.*

In regard to the principal debtor, he may never reclaim from the creditor what the creditor has unduly received in order to discharge the security, nor retain for it any part of the sum which he owes, when he pays: for the security having no recourse against the principal debtor for the sum which he has unduly given for the discharge of his securitiship, the principal debtor is without interest.

But if the security had a recourse against the principal debtor for the sum which he has given for the discharge of his securitiship, as if the principal debtor was obliged towards him to pay the debt in a certain time, and they had agreed that after the debtor had made default of so doing, he should permit the security to purchase from the creditor the discharge of his securitiship on the best terms he could,

for which he should be indemnified by the principal debtor; in this case it is not to be doubted that the principal debtor may retain this sum and deduct it from the debt when he shall pay it to the creditor; for by means of the recourse which the security has against him it is the same as if he had paid it to the creditor. *Molin. ibidem.*

ARTICLE III.

What persons may make a release and to whom.

§. I.

What persons may make a release.

583. It is only such a creditor as has the power to dispose of his property who may release a debt, or one deriving a special power from him to make this release.

An attorney with general power, for all one's affairs, a tutor, a curator, an administrator, have not this right. L. 37, ff. *de pact.* L. 22, ff. *de adm. tut. & passim*; for all those persons have only a power and capacity to administer and not to give: the release is a donation.

We must except the release which is made of part of the debt to a debtor in case of his bankruptcy. As it is not made so much *animo donandi*, as with the intention of securing in this way the payment of the surplus of the debt, and preventing a loss of the whole, this release may pass for an act of administration, of which these persons are capable. The releases which are made of a part of feudal rent to a person who comes to compound for such rents, before he concludes the bargain for the estate which he proposes to purchase, are also acts of administration which tutors and other administrators may make; for these releases are as compositions rather than donations: they are not made as much *animo donandi*, as to avoid the loss of a profit; the refusal of the release may cause the bargain for the estate to fail.

Tutors and other administrators may make a release of part of the rents, even after the bargain is concluded, and in the case of necessary commutations, provided they

be not excessive and are conformable to those which are usually made: for although one cannot deny that such releases are true donations, *liberalitas nullo jure cogente facta*, yet custom has made these releases, not indeed an obligation, but a sort of duty of prudence; and donations which are of this description are not forbidden to tutors and other administrators. *Arg.* L. 12, §. 3, ff. *de adm. tut.*

It is upon this foundation that the receivers of the king's rents are authorised to make a release of a fourth, which is passed to them in the chamber of accounts, provided that the purchasers declare their purchase and pay in three months. *Letters patent*, 1556, cited by Livoniere, *Traite des Fiefs.*

When there are several creditors *in solidum*, *correi credendi*, one of them may without the others make a release of the debt; and this release discharges the debtor towards all the creditors, as if the payment had been really made to all. L. 13, §. 12, ff. *de accept.*

§. II.

To whom the release may be made.

584. It is evident that the release of a debt can only be made to the debtor. For it is presumed to be made to the debtor, whether the agreement which includes this release intervene with the debtor himself, or with his tutor, curator, attorney or other administrators of his goods.

Relations in the ascending line having by the ordinance of one thousand seven hundred and thirty one, *art.* 7, capacity to accept of donations made to their minors, although they be not under their tutorship; it is a consequence that they may validly accept the release which the creditor of their minors would make to them.

585. When there are several debtors *in solidum*, the creditor may by the release of the debt which he makes to one of them, extinguish the debt and discharge all the others: L. 16, ff. *de tit.*; but it is necessary that it should appear that the creditor had an intention to discharge the debt: for if he had only an intention to discharge the person

of the debtor, his co-debtors are not discharged, except for the part of him who has been discharged, as it has been said in a preceding paragraph.

586. The release being a donation, it is necessary, in order that it may be valid, that the debtor to whom it is given should not be a person to whom the laws forbid it to be given: the release which a woman should make to her husband of what he owed her, or that which a sick man should make to his physician, would not be valid.

This ought not to extend to releases which are made rather by composition than by donation, such as those made in case of bankruptcy and compositions for feudal rents.

Although the release of a part of a feudal rent, made to a person to whom the laws do not permit it to be given, has not been made in the form of a composition, but as an absolute gift, as in the case of a necessary commutation, it ought to be valid, and ought not to pass for a prohibited donation, when it does not exceed those which the lord is accustomed to make to strangers, as when it is only the release of a fourth.

CHAPTER IV.

Of set-off.

587. SET-OFF is the extinction which is made of debts of which two persons are reciprocally the debtors, one to the other, by the credits of which they are reciprocally creditors, one to the other: *Compensatio debiti & crediti inter se contributio.* L. 1, ff. *de compens.* For example. If I owe you the sum of five hundred livres, as for a loan which you have made me of this sum, and on the other side I am your creditor of the like sum of five hundred livres, as for the lease of my house, which has since run out; the debt for which I am bound towards you will be extinguished by the right to oppose as a set-off the claim of the like

ſum which I have againſt you; and *vice versa*, the debt for which you are bound towards me will be extinguiſhed by the claim which you have againſt me.

The equity of a ſet-off is evident. It is eſtabliſhed upon the common intereſt of the parties between whom the ſet-off is made. It is evident that they have each an intereſt to make the ſet-off, rather than to be obliged to draw from the pocket to pay what they owe and bring ſuit for the payment of what is due to them. This is the reaſon which Pomponius adduces in the law 3, ff. *de compens. Ideo compensatio necessaria est, quia interest nostra potius non solvere, quam solutum repetere.* Add that the ſet-off avoids an uſeleſs circuity. *Quod potest brevius per unum actum expediri compensando, incassum protraheretur per plures solutiones & repetitiones.* This is the reaſon which Baldus gives of the right of ſet-off.

We ſhall ſee on this ſubject, I. againſt what debts a ſet-off may be oppoſed; II. what debts may be oppoſed as a ſet-off; III. how a ſet-off is made, and what are its effects.

§. I.

Against what debts a set-off may be opposed.

588. One may regularly oppoſe a ſet-off againſt debts of all things which are ſuſceptible of it.

Debts of things ſuſceptible of a ſet-off are the debts of a certain ſum of money, of a certain quantity of corn, wine and of other things determinable by number, weight or meaſure. The debt of a thing indeterminate of a certain kind, although it be not of the number of things ſo determinable, is alſo ſuſceptible of a ſet-off. For example. If by a bargain made between us, you have obliged yourſelf to give me a horſe *indeterminately*, without ſaying what horſe; this debt of a horſe, of which I am creditor by our bargain, is ſuſceptible of a ſet-off, and if afterwards, before I have been paid it, I become the only heir of a perſon who has bequeathed to you a horſe *indeterminately*, and in this quality your debtor of a horſe, it is evident that you could op-

poſe to me as a ſet-off this debt of a horſe of which I am debtor towards you by the teſtament of him to whom I have ſucceeded, againſt the debt of a horſe of which you are debtor towards me by our bargain.

On the contrary, when a thing, although in its nature a thing determinable by number, weight or meaſure, is due as a thing certain and determinate, the debt is not ſuſceptible of a ſet-off. For example. If I have purchaſed of you the ſix hogſheads of wine which you have made this year in your vineyard of St. Denis, and on the other ſide before you have delivered them to me, I have become the only heir of a perſon who has bequeathed to you ſix hogſheads of wine by his will, and in this quality your debtor of this quantity of ſix hogſheads of wine; you cannot oppoſe to me, againſt the debt of ſix hogſheads of wine of your vintage, which I have purchaſed of you, that of ſix hogſheads of wine of which I am the debtor towards you: and I ſhall be right in demanding that, without having regard to this ſet-off, you ſhould be holden to deliver to me the ſix hogſheads of your vintage which I have purchaſed of you, on offering to give you ſix other hogſheads of wine good and merchantable, ſuch as I might chooſe. The reaſon is, that as a ſet-off is a reciprocal payment which the two parties make to each other, a creditor cannot be obliged to receive as a ſet-off any other thing than what he would be obliged to receive in payment: according to the rule, *Aliud pro alio invito creditori ſolvi non potest, ſupra, n.* 494. The creditor of a thing certain and determinate cannot be obliged to receive in payment another thing than the thing certain and determinate which is due him; and one will not be received to offer him in payment another thing, although of the ſame kind with the thing certain and determinate which is due him. For the ſame reaſon, one cannot oblige him to accept as a ſet-off againſt the debt of a thing certain and determinate which is due him, the debt of things of the ſame kind of which he is debtor. The debt of a thing certain and determinate, although of the number, of things determinable by number, weight or meaſure, does not therefore admit of a ſet-off.

There is one case however in which the debt of a thing certain and determinate may be susceptible of a set-off; for if I were your creditor of an undivided part of a thing certain, as if you had sold me the undivided part which you had in a certain estate, and before you delivered it to me, I should become the heir of a person who was your debtor of another undivided part in the same estate; you might oppose, against the debt of the part of this estate for which you were bound towards me, the set-off of the debt of the part in the same estate for which I was bound towards you. *Sebast. de Medicis, Tract. de compens. p.* 1, §. 3.

589. When the thing due is susceptible of a set-off, one may oppose a set-off against the debt of this thing, from whatever cause this debt may proceed.

One may oppose it even against the debt of a sum due in virtue of a judgment. L. 2. *Cod. de compens.*

There are however some debts against which the debtor is not listened to in proposing a set-off.

I. In the case of spoliation, one may not oppose any set-off against the demand for the restitution of the things of which one has been despoiled, according to this maxim so well known: *Spoliatus ante omnia restituendus.* See *Sebast. de Medicis, Tract. de Compens. p.* 2, §. 28.

II. A depositary is not admitted to oppose any set-off against the demand which is made on him for the restitution of the deposit that has been confided to him. *In causa depositi compensationi locus non est. Paul, sent.* 11, 12, 13.

This text of Paul ought to be understood principally of an irregular deposit, such as that which is spoken of in the laws 24, 25, §. 1, & 26, §. 1, ff. *depos.*, by which one gives in trust to another a sum of money, to put it with other sums which are deposited by other persons and return, not the same pieces of money, but the same sum. If the deposit was an ordinary deposit, such as that of a bag of money sealed and marked, there would be no room for a set-off, not only because it is a deposit, but from the general rule that debts of a thing certain are not susceptible of it.

The depositary cannot indeed oppose, against the restitution of the deposit which is demanded from him, a set-off of claims which he might have against him who has confided it to him, when these claims have a cause not connected with the deposit; but when the cause for which the depositary is a creditor of him who has confided to him the deposit, proceeds from the deposit itself, as when he is a creditor for the expences which were necessary for the preservation of the deposit; not only has he in this case the right to a set-off, when the deposit is an irregular deposit; but even when it is a thing certain which is the object of the deposit, he has the right to retain it, *quasi quodam jure pignoris*, until he shall be paid his claim. This is the common decision of the authors cited by *Sebast. Med. Tract. de Compens. p.* 1, §. 19.

It is according to this principle that the receivers of consignations retain upon the sums consigned, the fees of consignation attributed to their offices.

III. The debt of a sum which has been given or bequeathed to me to serve for my maintenance, and with the clause that it shall not be liable to my creditors, is a debt against which one cannot oppose to me any set-off: for as this clause prevents it from being seised by third persons and employed in the payment of what I might owe to third persons, it prevents it, for the same reason, from being employed as a set-off in the payment of what I might owe to him who is the debtor of it. Sebastian de Meditis, *Tract. de comp. p.* 1, §. 11, adduces another reason for this decision, viz. that as maintenance is a thing necessary for life, this would be a sort of homicide, which he would commit who is charged to furnish them, if he should refuse them under any pretext whatever, even that of a set-off. *Necare videtur qui alimonia denegat*; L. 4, *de agnosc. liber.*

IV. A tenant cannot oppose as a set-off a sum which should be due him from the lord, in order to discharge himself from his obligation to go or send, at the day and place accustomed, to pay him the rent which he owes him.

The reaſon is that the debt of feudal rent includes not only a debt of a ſum of money, but that of an acknowlegment of tenure, which is ſomething valuable and therefore is not ſuſceptible of a ſet-off.

Feudal rent is not ſuſceptible of a ſet-off even againſt a debt of the like nature. *Finge.* I owe you for an eſtate ſituated within your ſeigniory three farthings rent, payable at your manor-houſe on St. Martin's day, on pain of five ſous for default. You owe me for an eſtate ſituated within my ſeigniory the like ſum of three farthings rent, payable the ſame day under the penalty of three other farthings only for default; a ſet-off cannot take place in this inſtance and we cannot thus diſcharge one another from going to pay the feudal rents. The reaſon is that a ſet-off, in order that it may take place, ſhould give to each of the parties what belongs to him. For example. If I owe you five hundred livres, and you ſhould owe me as much, a ſet-off, by the diſcharge which it procures me from the five hundred livres, I owe you, gives me truly the five hundred livres which were due me by you; for the diſcharge from your claim of five hundred livres, is worth truly five hundred livres. But in our inſtance, the diſcharge from the acknowlegment of tenure for the eſtate which I hold of you, cannot cauſe the like acknowlegment to me for that which you hold of me: there cannot therefore in this caſe be room for a ſet-off, ſince it cannot give to each of us what belongs to us: beſides *monumenta cenſuum interturbarentur; Dunod in Cons. Par. ad art.* 85, *gl.* 1, *n.* 38.

Obſerve that feudal rent is not ſuſceptible of a ſet-off, in this ſenſe, that the tenant cannot be diſcharged from going or ſending to pay the rent; but it may be ſuſceptible of it in this ſenſe, that the tenant who is a creditor of his lord for a ſum of money, may go at the day and place at which the rent is payable and offer to his lord in the place of the ſum of money which he owes for rent, a diſcharge of the like ſum for that which is due him by his lord; for he ſatisfies, in going to the place and making

theſe offers, the obligation of attornment. This ſet-off ought not however to be permitted, except when the rent conſiſts of a conſiderable ſum, and it ought not to take place for ſmall rents.; *Molin. ibid.*

A queſtion has heretofore been put, whether the debtor who has obliged himſelf by oath to the payment of the debt, may in *foro conſcientiæ*, as in *foro legis*, oppoſe as a ſet-off what is due him by his creditor. Several authors, eſpecially canoniſts, have maintained the negative, for a frivolous reaſon that the oath ought to be accompliſhed *in forma ſpecifica*. The opinion of thoſe who hold the affirmative is the beſt. The oath, added to an obligation, ſerves only to render the debtor more culpable when he contravenes it, and to induce him, by the fear of rendering himſelf guilty of perjury, not to contravene it; but the obligation, although confirmed by an oath, remains the ſame, and the oath cannot prevent its being diſcharged in any way in which obligations may be diſcharged, and conſequently by ſet-off. *Sch. Medicis, Tract. de Comp. p.* 2, §. 25.

One may oppoſe a ſet-off not only againſt debts which are due from particular perſons, but alſo againſt thoſe which are due from cities, bodies corporate or communities. The law 3, *Cod. de compens.*, excepts however certain kinds of debts due to cities, againſt which it does not permit a debtor to oppoſe any ſet-off of what the city ſhould owe him.

The law 1, *Cod. d. tit.*, admits of a ſet-off even againſt the treaſury, provided however that the debt from which I defend myſelf by the ſet-off as well as that which is oppoſed as a ſet-off, are depending each in the ſame office. *Fiscum est compensationi in causa fiscali locum esse, si eadem statuitur quid debeat quæ petit; d.* L. 1. For example. I cannot oppoſe a ſet-off againſt my capitation tax which I owe at Orleans, the arrearages which are due me from another branch of the revenue at Paris.

§. II.

What debts may be opposed as a set-off.

590. In order that a debt may be oppoſed as a ſet-off, it is neceſſary, I. that the thing due be of the ſame kind with that which makes the object of the debt againſt which the ſet-off is oppoſed. *Compensatio debiti ex pari specie, licet ex causa dispari, admittitur. Paul. sent.* 11, r. 3. For example. I would oppoſe as a ſet-off againſt a ſum of money which I owe you, the debt of a like ſum of money which you owe me: theſe debts are of the ſame kind, *ex pari specie.* But I cannot oppoſe as a ſet-off againſt a ſum of money which I owe you, the debt of a certain quantity of corn which you owe me.

The reaſon is, that as a ſet-off is a payment, and as I cannot pay my creditor againſt his will another thing than what I owe him, *supra, n.* 494, I cannot, for the ſame reaſon, oblige him to receive as a ſet-off againſt the ſum of money which I owe him, the corn which he owes me: for this would oblige him to receive corn for the money which is due to him; conſequently to receive in payment another thing than what is due him.

Although one cannot oppoſe, againſt the debt of a thing certain and determinate, the debt of a quantity, although of things of the ſame kind, as we have ſeen in the preceding article, *n.* 588; *contra, vice versa*, one may againſt the debt of a quantity oppoſe the ſet-off of a thing certain and determinate of the ſame kind. For example. I am your creditor of ſix hogſheads of wine of your vintage, which you have ſold me, and at the ſame time your debtor of ſix hogſheads of wine *in genere*, which a perſon to whom I have ſucceeded has bequeathed to you; you cannot oppoſe to me, againſt the debt of ſix hogſheads of wine which you have ſold me, that of the ſix hogſheads *in genere* which I owe you: becauſe you are not permitted to pay me any other thing than the ſame ſix hogſheads of wine. On the contrary, if you demand of me the payment of ſix hogſheads of wine *in genere* which I owe you, I may oppoſe to

you as a set-off, the debt of the six hogsheads of wine which you have sold me; because if you had delivered them to me, I might give them to you in payment of the six hogsheads of wine which I owe you.

Observe however that as this set-off *speciei mihi debitæ ad quantitatem*, depends on my choice, it does not take place but from the day on which I declare my choice and oppose the set-off; whereas a set-off which is made *quantitatis ad quantitatem*, takes place from the moment the creditor becomes debtor, as we shall see, *infra*.

591. It is necessary, II. that the debt which is opposed as a set-off should be a debt whereof the payment has fallen due. *Quod in diem debetur, non compensabitur antequam dies veniat.* L. 7, ff. *de compens.* The reason is evident. A set-off is a reciprocal payment which the parties make to each other; the debtor of a debt whereof the payment has not yet fallen due, not being yet bound to pay, is not yet bound to admit the set-off of it against his demand.

The time of payment, the arrival of which is necessary for the set-off, is the time when the debtor has of right in virtue of the agreement. It is otherwise of a time of grace which may have been granted to him. For example. If I have a judgment against my debtor for the sum of one thousand livres, which I lent him, and by the judgment he has granted him the time of three months to pay it, and in one month after the judgment this debtor, becoming heir of my creditor to whom I owe the like sum of one thousand livres, demands of me this sum, I may oppose to him as a set-off the debt of one thousand livres which he owes me, although the time of three months which was granted him is not expired: for this time is but a time of grace granted only for the purpose of arresting the rigor of constraint, but which cannot arrest the set-off: *Aliud est diem obligationis non venisse, aliud humanitatis gratia tempus indulgeri solutionis;* L. 16, §. 1, ff. *de compens.*

592. It is necessary, III. that the debt which is opposed as a set-off should be liquidated; L. *fin.* §. 1, *Cod. de compens.*

A debt is liquidated when it is known what is due, and how much; *cum certum est an et quantum debeatur.*

A conteſted debt therefore is not liquidated and cannot be oppoſed as a ſet-off, unleſs he who oppoſes it has the proof of it at hand and is able to prove it readily and ſummarily.

Although it ſhould even be known that ſomething is due, yet while it is not known how much is due, and the liquidation depends on an acount which would require a long diſcuſſion, the debt is not liquidated and cannot be oppoſed as a ſet-off.

593. It is neceſſary, IV. that the debt ſhould be determinate. Therefore if one has charged his heir to give me one hundred piſtoles, or his two carriage horſes, and I owe the like ſum of one hundred piſtoles to this heir, I cannot oppoſe to him as a ſet-off the hundred piſtoles which have been bequeathed to me, while he has a choice of the hundred piſtoles or the horſes: becauſe this ſum is not due *determinately.* But if the teſtator had given me the choice of them, I might oppoſe the ſet-off, which however would take place only from the day on which I made my choice: *Si decem decem millia aut hominem, utrum volet adversarius; ita compensatio admittitur, si adversarius palam dixisset utrum voluisset;* L. 22.

594. It is neceſſary, V. that the debt be due to the ſame perſon who oppoſes it as a ſet-off. *Ejus quod non ei debetur qui convenitur, sed alii, compensatio fieri non potest.* L. 9, *cod. d. tit.*

Therefore I cannot oppoſe, againſt what I owe, a ſet-off of what my creditor owes to my father, my children, to thoſe of whom I am tutor, curator or adminiſtrator, or to my wife who has a ſeparation of eſtate. If there is a community of eſtate between us, what is due to her, is actually due to me; conſequently I may oppoſe a ſet-off.

Papinian, in the law 18. §. 1, ff. [illegible]., carries this principle ſo far as to decide that my [illegible] not obliged to accept the ſet-off of what he [illegible] other

well as to me, although this third perſon, his creditor, ſhould intervene and offer to make a ſet-off for me of what is due him. *Creditor compensare non cogitur quod alii quam debitari suo debet, quamvis creditor ejus, pro eo qui convenitur, proprium debitum velit compensare. Finge.* You bring a ſuit againſt me for the ſum of one hundred livres, which I owe you; you owe the like ſum to Peter, and I ſignify to you an inſtrument of writing by which Peter conſents that the ſum of one hundred livres which you owe him ſhould be oppoſed as a ſet-off againſt that which you demand of me; and I conſequently plead the ſet-off to be diſcharged from your ſuit, of which I offer to pay the coſts. Papinian pretends that you are not obliged to admit this ſet-off; but Barbeyrac in his notes on Puffendorf thinks, with reaſon, that Papinian has carried too far the ſubtilty, and that the ſet-off ought to be admitted, for it being indifferent to you to receive of me or Peter the hundred livres which I owe you, it is unjuſt that your ſuit ſhould be maintained againſt me for the payment of this ſum, when Peter is willing that you ſhould receive this ſum of him for me as a ſet-off of that which you owe him.

We may reconcile Barbeyrac with Papinian by a diſtinction. If the ſum which I owe Peter is equal to that which you owe me, I cannot prevent its being oppoſed as a ſet-off againſt that which you owe me, when you make Peter intervene, who conſents that it ſhould be ſo oppoſed: this is the caſe in which the deciſion of Barbeyrac ought to be followed. But if the ſum which I owe to Peter is leſs than that which you owe me, any offer which Peter ſhould make to ſuffer the ſum which you owe him to be oppoſed as a ſet-off againſt that which I owe you, would not oblige you, according to the deciſion of Papinian, to admit this ſet-off, unleſs I offer at the ſame time to pay you the ſurplus: for otherwiſe it would oblige you to receive your debt in parts, a thing to which you cannot be holden. It is only in the caſe in which I am myſelf your creditor of a part of the ſum which I owe you, that the ſet-off takes

place, and to the effect to extinguish, against your will, my debt for part, to the amount of the sum which I owe you.

It is the concurrence of the qualities of creditor and debtor in the same persons which effects this set-off *de jure*, to the amount due and concurring; no person being indeed my creditor but under the deduction of what he owes me, nor indeed my debtor but under the deduction of what I owe him.

He to whom are ceded the rights of a creditor is not truly, according to the subtilty of the law, a creditor, but only an attorney *in rem suam* of the creditor. Yet as he is in effect a creditor when he has signified the cession to the debtor, he may oppose this claim as a set-off to the debtor towards whom he is himself a debtor, as well as every other of which he should be creditor in his own right. *In rem suam procurator datus, si vice mutua conveniatur, æquitate compensationis utetur;* L. 18, ff. *de compens.*

595. The rule which we have just established that one can oppose as a set-off only what is due to himself, receives an exception in regard to securities. He from whom is demanded the payment of a sum which he is obliged to pay as a security of another person, may oppose to the plaintiff the set-off, not only of what is due him himself by the plaintiff, but also of what is due by the plaintiff to the principal debtor: *Si quid a fidejussore petitur, æquissimum est fidejussorem eligere quod ipsi an quod reo debetur, compensare malit;* L. 5, ff. *d. tit.*

The reason is, that it is of the substance of securityship that the security be not obliged to more than the principal, and that he may therefore use the same pleas which the principal debtor could use; *supra*, *n.* 380: the principal debtor could oppose to the creditor a set-off of what his creditor owed him; the security therefore may also oppose the set-off of the same debt.

It is not the same *vice versa*; the principal debtor can-

not oppoſe to his creditor a ſet-off of what his creditor owes to the ſecurities.

May a debtor *in ſolidum* oppoſe as a ſet-off what is due to his co-debtor? See *ſupra, n.* 274.

596. It is neceſſary, VI. that the debt which is oppoſed as a ſet-off ſhould be due by the ſame perſon to whom it is oppoſed. For example. If one demands of me the payment of what I owe him, I cannot oppoſe to him as a ſet-off what is due me by the minors of whom he is tutor; and *vice versa*, if, in quality of tutor, he demands of me the payment of what I owe to his minors, I may not oppoſe to him the ſet-off of what he owes me himſelf. *Is quod pupillorum nomine debetur si tutor petat, non posse compensationem objici ejus pecuniæ quam ipse tutor suo nomine debet;* L. 23, *d. tit.*

For the ſame reaſon, I cannot oppoſe to my creditor the ſet-off of what his wife owes me, when ſhe has a ſeparation of property; but I may oppoſe it if ſhe is in a community of property with him; becauſe he is himſelf bound for the debts of his wife; he has himſelf become the debtor of it by the community of property which he has contracted with her. This takes place even when there was a clauſe for the ſeparation of debts; unleſs he could prove by the detail of an inventory that there does not remain to him in his hands any monies of the property of his wife; for without this he is debtor himſelf of what is due by his wife. We may, in ſupport of our deciſion, derive an argument from the law 19, which decides that one may oppoſe to the maſter, to the amount of the wages of his ſervant, the ſet-off of what is due by his ſervant; this debt of the ſervant being the debt of the maſter, to the amount of his wages that are due.

When my creditor has made to ſome one a tranſfer of the claim he had againſt me, I may oppoſe to the aſſignee a ſet-off, not only of what is due me by him, but alſo of what is due me by his aſſignor; provided I commenced

to be creditor of his aſſignor before the ſignification or acceptance of the transfer: for this claim not having paſſed ſooner to the perſon of the aſſignee according to the maxim of our law, that a transfer does not take effect until it be made known; and having therefore until this time reſided in the perſon of the aſſignor, all the rights which I might until this time have acquired againſt the aſſignor, have by virtue of the ſet-off extinguiſhed and diminiſhed *de jure*, to the amount due and concurring, that which he had againſt me and of which he made a transfer.

If I do become a creditor of the aſſignor only from the time of the ſignification of the transfer, there will be no room for the ſet-off; for he has ceaſed to be my creditor by this ſignification: or if he were my creditor, it would be only *juris ſubtilitate & non juris effectu.*

Although I ſhould become a creditor of the aſſignor before the transfer, yet if having a knowledge of my claim, I nevertheleſs accepted the transfer abſolutely, I am preſumed by my abſolute acceptance to have renounced the ſet-off, and I cannot oppoſe it to the aſſignee, who has counted upon my acceptance; ſaving to myſelf my claim againſt the aſſignor. This is what has been adjudged in the caſes cited by Deſpeiſſes.

597. According to the principles of the civil law, I may oppoſe to you as a ſet-off of what you owe me at this place, a ſum which you you owe me and which is payable in another place, making you at the ſame time ſatisfaction for the coſt of the remittance from the place where it was payable to this other. L. 15, ff. *de compens.* The creditor, according to the principles of the civil law, having the action *de eo quod certo loc*, to oblige his debtor to pay wherever he finds him, the ſum which was payable elſewhere, allowing him the coſt of remitting it, it was a conſequence that he might likewiſe oblige him to admit a ſet-off. But this action *de eo quod certo loco* not being in uſe among us, and the creditor not having power to exact the payment of a ſum, payable in a certain place, in any other than the

for this that mention is made in those texts, of set-offs pleaded by one party, admitted or rejected by the judge; but it cannot thence be concluded that the debt was not discharged by the set-off before it was pleaded. I am obliged to plead the set-off only in order to inform the judge that the debt has been extinguished by the set-off; in the same manner as when one has demanded from me a debt which I have paid, I am obliged, in order to instruct the judge, to plead the payment and bring forward my receipts.

It is usual also to oppose to our principle the law 6, *Cod. de compens.*, in which the set-off is called *mutua petitio*, which would seem to suppose that the respective actions of the parties exist before the judge pronounces the set-off. The answer is that it is only in a very improper sense that the set-off opposed by the defendant is called *mutua petitio* in this law; which signifies nothing else but the simple allegation of the claim which the defendant had against the plaintiff and by which that of the plaintiff has been extinguished. Our answer is founded on the law 21, ff. *de comp.*, where it is expressly said that he who alledges the set-off does not make a demand, but only defends himself from that which is made against him, by making it appear that it does not amount to the sum opposed as a set-off. *Postquam placuit inter omnes*, says this law, *id quod invicem debetur ipso jure compensari, si procurator absentis conveniatur, non debebit de rato cavere*, (to be admitted to alledge the set-off, as he would be obliged if he were to make a demand); *quia nihil compensat, sed ab initio minus ab eo petitur*: that is to say, *non ipse compensat, non ipse aliquid mutuo petit, sed allegat compensationem ipso jure factam, quæ ab initio jus petitoris ipso jure minuit.*

600. The effects of the set-off are consequences from the principle which I have established.

These effects are, I. that if my creditor to whom I have given goods in pledge, has become my debtor, I may claim those goods, on offering him only what I owe him above what he owes me; the set-off which is made of our

reciprocal debts to the amount due and concurring, being equivalent to the payment of the ſurplus. This is the deciſion of the law 12, *Cod. de compens.*

II. If you had againſt me a claim of a certain ſum of money, from its nature producing intereſt, and you have ſince become my debtor of a ſum of money; although my claim ſhould not be of a nature, like yours, to produce intereſt, yet my claim will be holden by virtue of the ſet-off to have diſcharged yours to the amount due and concurring, from the day that you become my debtor of it, and from that day the intereſt to the amount due will ceaſe to run. For example. If you were my creditor for the ſum of one thouſand livres for the price of a piece of land which you had ſold and delivered to me and you have ſince become ſole heir of Peter who owed me the ſum of eight hundred livres on a loan; from the day that you became heir of Peter and in this capacity my debtor of that ſum of eight hundred livres, that is to ſay, from the day of the death of Peter, your claim of one thouſand livres is conſidered to have been diſcharged to the amount of the ſaid ſum of eight hundred livres, and to exiſt only for the two hundred livres remaining: and from that day the intereſt will ceaſe to run, except upon the remaining ſum of two hundred livres. This is the deciſion of the conſtitution of Septimius Severus, reported by Ulpian: *Quum alter alteri pecuniam ſine usuris, alter usurariam debet, conſtitutum est a divo Severo concurrentis apud utrumque quantitatis usuras non esse præstandas*; L. 11, ff. *de compens.*

The ſame deciſion is found in the conſtitution of Alexander; *Si conſtat pecuniam invicem deberi, ipso jure pro soluto compensationem haberi oportet ex eo tempore, ex quo ab utraque parte debetur utique quoad concurrentes quantitates, ejusque solius quoad amplius apud alterum est usuræ debentur*; L. 4, *Cod. d. tit.*

This effect of the ſet-off takes place only in ordinary ſet-offs, *quantitatis certæ ac determinatæ ad certam ac determinatem quantitatem*, which are *de pleno jure*: but in ſet-offs

which do not take place but from the day when they are pleaded, the intereſt ought not to ceaſe to run but from this day. For example. If you were my creditor for the ſum of one thouſand livres, for the price of an eſtate which you have ſold me, and which conſequently bears intereſt, and you have ſince become the only heir of Peter who has bequeathed to me two carriage horſes or the ſum of one thouſand livres, at my choice; the intereſt of the ſum of one thouſand livres which I owe you, does not ceaſe to run from the day of the death of Peter, which is the day when you become debtor of the legacy which he bequeathed to me; they would ceaſe only from the day when I ſhould declare that I would chooſe the ſum of one thouſand livres for my legacy; it is only from this day that the ſet-off is made of this ſum againſt that which I owe you, as we have already obſerved *ſupra*, *n.* 593.

601. III. Although my creditor cannot be obliged to receive in part the actual payment which I would make him, *ſupra*, *n.* 478; yet if he has become my debtor of a ſum leſs than that which I owe him, he is obliged to ſuffer the partial diſcharge of his demand, which is made in this caſe by virtue of the ſet-off, as it reſults from the laws above adduced.

602. IV. If I were your debtor for three different cauſes, and have ſince become your creditor of the ſum of one thouſand livres, the ſet-off of the claim of one thouſand livres which I have acquired againſt you, ought to be made againſt that one of the three debts from which I have the greateſt intereſt to be diſcharged. The reaſon is, that as the ſet-off is in the place of payment, for the ſame reaſon that in payments the application is made upon that one of the debts which the debtor has the greateſt intereſt to diſcharge, *ſupra*, *n.* 550, the ſet-off ought likewiſe to be made upon that one of the debts which he has the moſt intereſt to diſcharge.

This deciſion obtains only when the different debts of which I was your debtor have all preceded the claim which I have ſince acquired againſt you. But if being your

debtor of the ſum of one thouſand livres, I have ſince become your creditor of the like ſum, and have ſince contracted a new debt towards you, although this ſhould be a debt from which I might have more intereſt to be diſcharged than from the firſt, yet you may demand of me payment of it, without my being able to oppoſe as a ſet-off of the claim I have acquired; this claim having been extinguiſhed as ſoon as I had acquired it, by the ſet-off which is made *de jure*, of this claim againſt the firſt which you had againſt me. *Tindar. Tract. de compens. art. 7, in fin. Sebaſt. Medicis, p.* 2, §. 12.

603. If he who was my creditor of a certain ſum of money, has ſince become my debtor of as much, and notwithſtanding the ſet-off which has extinguiſhed, *de plano jure*, our reſpective claims, I have paid it to him, I may recover from him the ſum which I have paid him, as not due, by the action which is called *condictio indebiti*. This is what Ulpian decides in the law 10, §. 1, ff. *de compens. Si quis compenſare potens ſolverit, condicere poterit quaſi indebito ſoluto.*

This text proves very clearly the principle which we have eſtabliſhed, that the ſet-off is made of full right, and extinguiſhes by mere virtue of the law, the reſpective debts of the parties, without its being pleaded by either of the parties or pronounced by the judge; otherwiſe in this inſtance, in which, when I have paid, the ſet-off has neither been pleaded nor pronounced by the judge, one could not ſay that I have paid what I no longer owed.

Hence ariſes a queſtion which may be put in the following hypotheſis. I was your debtor of the ſum of one thouſand livres; I have ſince become the only heir of Peter, who was your creditor of the like ſum, for the return of a diviſion. Notwithſtanding the ſet-off of which I could have availed myſelf, I have paid you this ſum of one thouſand livres. Afterwards your goods have been actually ſeized by your creditors and particularly thoſe to whom you have fallen in debt by the diviſion you made with Peter. I oppoſe this decree and demand to be placed

in the order of a privilege upon the price of theſe goods, for the return of the diviſion which you owed Peter to whom I have ſucceeded. Are the other creditors well grounded in oppoſing it? It ſeems that they are well grounded; for the demand of Peter for the return of the diviſion, has been extinguiſhed at the ſame time that I ſucceeded to it, by virtue of the ſet-off which is made of this claim which I have acquired againſt you, againſt that of the like ſum of one thouſand livres which you have againſt me. The payment which I have ſince made you has not power to revive our reſpective claims which the ſet-off has extinguiſhed; it can only give me a ſimple action to reclaim the ſum which I have paid you, as having been paid without being due, and this action has no hypothecation, or it has at the moſt a ſimple hypothecation from the day of the diſcharge, if it was before a notary. It was not in my power, in paying you voluntarily a debt which was extinguiſhed by the ſet-off of this debt againſt the claim which I have acquired againſt you, to revive my claim with the hypothecations that were attached to it, to the prejudice of creditors who have followed me, and of the right of priority in the hypothecations which has been acquired to them by the ſet-off which has extinguiſhed our reciprocal claims.

Notwithſtanding theſe reaſons I think it is neceſſary to uſe a diſtinction on this queſtion. If, ſince I have ſucceeded to Peter, but before I had knowledge that there was in this eſtate a claim of one thouſand livres againſt you, I have paid you the one thouſand livres which I owed you myſelf, I think that in this caſe I ought to be put in the order of privilege, for the claim of one thouſand livres for which I have ſucceeded to Peter, and that we ought to judge in this caſe that there is not made of it any ſet-off. The reaſon is, that as the ſet-off is a fiction of law which ſuppoſes that the parties have reſpectively paid themſelves, as far as they were creditors and debtors at the ſame time of one another, this fiction which is eſtabliſhed in favor of the parties between whom the ſet-off is made, ought not

to be extended so far as to be prejudicial to them and to lead them into error; a benefit of the law ought never to become prejudicial to those to whom the law grants it. *Beneficium legis non debet esse captiosum.* We ought not then to suppose in this case that there has been a set-off; for it would be prejudicial to me, it would lead me into error. It would make me, without my fault, lose the sum of one thousand livres for which I had a privileged hypothecation. We must decide otherwise in the case in which I had not paid you the one thousand livres which I owed you myself, till after the inventory of the estate of Peter, which has given me knowledge of the claim which the succession to this estate has given against you. Nothing hinders the supposition in this case that the set-off has extinguished our respective claims. It is not in this case the law of the set-off which has caused me a prejudice or led me into error. If I lose the thousand livres which I have unadvisedly paid you, I ought not to impute it to the law of set-off, but to myself, who have been willing to pay you a debt which I knew to be discharged by the set-off. It was not in our power to revive my claim by this payment, in fraud of the right acquired by the creditors who followed me.

604. How ought we to decide in the following instance? I was your debtor of the sum of one thousand livres. I have since become your creditor of as much, *puta*, in becoming the only heir of Peter, to whom you owed the like sum. Upon the suit which you have brought against me for the payment of this sum of one thousand livres, which I owed you, having neglected to oppose the set-off of that which you owed me, I have been condemned to pay you this sum and have paid it to you in execution of the judgment. Have I in this case any recourse? I cannot have, as in the preceding case, the action *condictio indebiti*. The law 2, *Cod. de compens.*, decides that although I might yet oppose the set-off of my claim against your proceedings in execution of the judgment, there will be no ground for the action

condictio indebiti; becauſe what is paid in execution of a judgment cannot be regarded as paid without cauſe. This action *condictio indebiti* does not take place but when the payment has been made without any cauſe, and conſequently without a judgment. *Pecuniæ indebitæ per errorem, NON EX CAUSA JUDICATI ſolutæ, esse repetitionem jure condictionis non ambigitur.* L. 1, *Cod. de cond. indeb.* Shall I then in this caſe be deprived of all remedy? It muſt be ſaid that in this caſe, although, according to the ſubtilty of the law, the ſet-off has extinguiſhed our reſpective claims in the ſame inſtant I ſucceeded to that which Peter had againſt you, yet this ſet-off ought, in this inſtance, to be regarded as not having taken place: this action to which I have ſucceeded, and the action which grows from it, ought to be reſtored to me, and I ought to be admitted to bring ſuit upon it.

The reaſon is, that as this ſet-off has not had its effect with regard to you, and relatively to the claim which you had againſt me, by the judgment which has been rendered againſt me for the payment of this claim, equity does not permit it to exiſt with regard to me, and relatively to the claim which I had on my ſide againſt you. This is what Tindarus decides very properly in his treatiſe *de compens.*, and it is in this ſenſe that he explains the law 7, §. 1, ff. *de compens.*, which ſays, *Si rationem compensationis Judex non habuerit, salva manet petitio*; which is to ſay, when the judge has condemned one of the parties towards the other, notwithſtanding the ſet-off which had extinguiſhed their reciprocal claims, either becauſe it was not pleaded, or becauſe, being pleaded, the judge has omitted to pronounce upon it, the claim which the party condemned had againſt the other is preſerved to him, *salva manet petitio. Lex enim*, ſays Tindarus, *hoc casu restituit actionem peremptam, ex maxima necessitate, sicut facit in multis casibus, æquitate suggerente.* See L. 1, *in fin.* ff. *ad Velleian.*

Is my claim reſtored to me with the hypothecations that were attached to it, or without them? I imagine that

it is neceſſary in this caſe to make a diſtinction. If there is no room to ſuſpect that it was by colluſion with you and to make you receive money to the prejudice of your creditors, that I have not pleaded the ſet-off of the claim which I had inherited from Peter againſt you; *puta*, becauſe I had no knowlege of it at the time of the judgment; the death of Peter being ſcarcely known in public, or at leaſt no inventory having been made of his papers, from which alone I could have knowlege of this claim; in this caſe I think my claim ought to be reſtored with its hypothecations. But if, having already a knowlege of the claim I had againſt you, I have ſuffered myſelf to be condemned without oppoſing to you the ſet-off, or if I have only oppoſed it *perfunctorie*, without eſtabliſhing it, ſo that the judge has not pronounced upon it, in this caſe my claim againſt you will be preſerved to me; but I ſhall not be permitted to exerciſe the hypothecations that were attached to this claim, to the prejudice of the creditors who followed me in the order of hypothecation, and by whom the right of priority of hypothecation was acquired, as ſoon as I ſucceeded to the claim of Peter, by the ſet-off and extinction of our reciprocal claims which then took place: equity does not permit that by a colluſion with you I ſhould deprive thoſe creditors of this right which was acquired by them.

CHAPTER V.

Of the extinction of the debt by confuſion.

605. WE call *confuſion* the concurrence in the ſame ſubject, of two qualities, which mutually deſtroy each other. That of which we mean to ſpeak here is the concurrence of the qualities of creditor and debtor, of the ſame debt, in the ſame perſon. We ſhall ſee, I. in what caſes this confuſion takes place; II. what are its effects.

The Roman Juriſts admitted another kind of confuſion, in the caſe in which a ſecurity became heir to the

principal debtor, and the surety. We shall say nothing of it here, having already treated of it supra, part. 2 ch. 6, §. 1. num. 6.

§. I.

In what cases confusion takes place.

607. Confusion takes place when the creditor becomes heir of his debtor, and vice versa, when the debtor becomes heir to his creditor. Thus the heir succeeds to all the rights as well active as passive of the deceased, when the creditor becomes heir of his debtor; he becomes, in this capacity, creditor of the debt of which he is in his own right the debtor. In both cases the qualities of the creditor and debtor of the same debt happen to concur in the same person.

The same thing happens when the creditor succeeds to the debtor in some other manner which renders him liable for his debts, as when he becomes his universal donatory, or when the debtor succeeds in any manner to the claim of the creditor. In all these cases the qualities of creditor and debtor of the same debt happen to concur in the same person.

The same thing happens also when the same person becomes heir of the creditor and of the debtor, or succeeds to both by some other universal title.

The acceptance of a succession with the benefit of inventory does not operate any confusion; for it is one of the effects of the benefit of inventory, that the beneficiary heir and the estate should be regarded as two different persons, and that their respective rights be not confounded.

§. II.

Of the effect of confusion.

608. It is evident that by the concurrence of these two contrary qualities of creditor and debtor in the same person,

they mutually deſtroy themſelves: for one cannot be creditor and debtor at the ſame time; one cannot be creditor of one's ſelf or towards one's ſelf. From this reſults indirectly the extinction of the debt, when there is no other debtor; for as there cannot be a debt without a debtor, the confuſion extinguiſhing, in the perſon who was the only debtor, the quality of debtor, and there remaining conſequently no longer a debtor, there can no longer be a debt. *Non potest esse obligatio, sine persona obligata.*

608. The extinction of the principal obligation which is made by the confuſion, when the [illegible] of the principal debtor, *aut vice versâ*, draws after it the extinction of that of the ſecurities; L. 34, §. 1 [illegible] L. 34, §. 8, L. 71, ff. *de solut.* The reaſon is, that the obligations of the ſecurities are only acceſſory to the obligation of the principal debtor. *Fidejussor accedit obligationi principalis.* Whence it follows that they cannot exiſt when the principal obligation no longer exiſts, according to this rule of law, *Quum principalis causa non subsistit, ne ea quidem quæ sequuntur locum habent*; L. 129, §. 1, ff. *de reg. jur.*; and this other, *Quæ accessionum locum obtinent, extinguuntur, cum principales res peremptæ fuerint.* L. 2, ff. *de pecul. leg.*

Add that a ſecurity ſuppoſes a principal debtor for whom the ſecurity is obliged: whence it follows that when by means of the confuſion there is no longer a principal debtor for whom the ſecurity is obliged, there can no longer be a ſecurity. This is the reaſon which the law 34, §. 1, ff. *de fid.*, [illegible] *Quia nec reus est pro quo debeat.*

Add alſo that it is repugnant that I ſhould be a ſurety for one towards myſelf: it is then neceſſary that the obligation of the ſecurity ſhould extinguiſh itſelf, when the perſon for whom he is obliged becomes, by the acceptance of the ſucceſſion to the creditor, the ſame perſon the one towards whom the ſecurity is obliged: *Fidejussores ideo liberari, quia pro eodem apud eumdem debere cœperunt.* This is the reaſon of the law 34, §. 8, *de solut.*

609. *Contra vice versa*, the extinction which [illegible]

principal debtor, *aut vice versa.* We shall say nothing of it here, having already treated of it *supra, part.* 2 *ch.* 6, §. 1, *corolll.* 6.

§. I.

In what cases confusion takes place.

606. Confusion takes place when the creditor becomes heir to his debtor, *aut vice versa,* when the debtor becomes heir to his creditor. For as the heir succeeds to all the rights, as well active as passive, of the deceased, when the creditor becomes heir of his debtor; he becomes, in this capacity of heir, debtor of the debt of which he is in his own right the creditor: and *vice versa,* when the debtor becomes heir of his creditor, he becomes, in this capacity of heir, creditor of the same debt of which he is in his own right the debtor. In both cases the qualities of the creditor and debtor of the same debt happen to concur in the same person.

The same thing happens when the creditor succeeds to the debtor in some other manner which renders him liable for his debts, as when he becomes his universal donee; or when the debtor succeeds in any manner to the claim of the creditor. In all these cases the qualities of creditor and debtor of the same debt happen to concur in the same person.

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608. The extinction of the principal obligation which is made by the confuſion, when the quality of creditor and of the principal debtor, *aut vice versa*, draws after it the extinction of that of the ſecurities, L. 34, §. 8, L. 71, ff. *de solut.* The reaſons of the obligations of the ſecurities are only acceſſory to the obligation of the principal debtor. *Fidejussor accedit obligationi principalis.* Whence it follows that they cannot exiſt when the principal obligation no longer exiſts, according to the rule of law, *Quum principalis causa non subsistit, ne ea quidem quæ sequuntur locum habent*; L. 129, §. 1, ff. *de reg. jur.*; and this other, *Quæ accessionum locum obtinent, extinguuntur, cum principales res peremptæ fuerint.* L. 2, ff. *de pecul. leg.*

Add that a ſecurity ſuppoſes a principal debtor for whom the ſecurity is obliged: whence it follows that when by means of the confuſion there is no longer a principal debtor for whom the ſecurity is obliged, there can no longer be a ſecurity. This is the reaſon which the law 88, §. 1, ff. *de fid.*, adduces: *Quia nec reus est pro quo debeat.*

Add alſo that it is repugnant that I ſhould be a ſecurity for one towards myſelf: it is then neceſſary that the obligation of the ſecurity ſhould extinguiſh itſelf, when the perſon for whom he is obliged becomes, by the acceptance of the ſucceſſion to the creditor, the ſame perſon as the one towards whom the ſecurity is obliged: *Nil fussores ideo tenari, quia pro eodem apud eumdem debent non teneri.* This is the reaſon of the law 34, §. 8, L. *solut.*

609. *Contra vice versa*, the extinction which [illegible]

of the obligation of the ſecurity by the confuſion, when the creditor becomes the heir of the ſecurity, or the ſecurity becomes the heir of the creditor, does not draw after it the extinction of the principal obligation. *Si creditor fidejussori hæres fuerit, vel fidejussor creditori, puto convenire confusione obligationis non liberari reum;* L. 71, ff. *de fidejussor.* The reaſon of this difference is, that the acceſſory obligation cannot in truth exiſt without the principal obligation, but the principal obligation has no need of the acceſſory obligation in order to exiſt.

Confuſion differs in this from payment. The reaſon of this difference is, that payment makes the thing no longer due; for the thing ceaſes to be due when it has been paid by any one. There can no longer remain a debtor, either principal or acceſſory, when there is no longer any thing due: the payment made by the ſecurity having therefore made the thing due by the ſecurity, which is the ſame with that due by the creditor, no longer due, and it no longer remaining a thing due, it is neceſſary that the obligation of the principal debtor ſhould be extinguiſhed, as well as that of the principal debtor who has paid.

The ſame thing may be ſaid of an actual releaſe, of ſet-off, of novation and of the other kinds of diſcharges which are equivalent to payment.

On the contrary, the confuſion makes only the debtor in whom is found to concur the qualities of creditor, ceaſe to be bound, becauſe he cannot be ſo towards himſelf. *Personam eximit ab obligatione;* but nothing prevents the obligation of the principal debtor from exiſting, although the ſecurity has ceaſed to be bound.

For the ſame reaſon when the creditor of two debtors *in solidum* becomes heir of one of them, the other co-debtor remains bound.

Is he for the whole? The law 71, ff. *de fidej.*, decides that if the two debtors *in solidum* were partners, this debtor, who was not in this caſe debtor of the whole, except with a remedy over againſt the perſon with whom confu-

ſion is made, would not remain bound but under a deduction of the part for which he would have had this recourſe againſt him: it not being juſt that the confuſion ſhould deprive him of this recourſe.

In our juriſprudence, each of the debtors *in solidum*, although they be not partners, having, on payment, a recourſe againſt the others for their part, as we have ſeen *supra n.* 281., it is neceſſary to decide without diſtinction, that when there is made a confuſion of the debt in the perſon of one of the debtors *in solidum*, the other remains bound only under a deduction of the part for which he would have had recourſe againſt him with whom the confuſion is made. We have already ſeen, *supra, n.* 275, that when the creditor has diſcharged one of the debtors *in solidum*, the other would not remain bound but under a deduction of the part for which he would have had recourſe againſt his co-debtor who has been diſcharged; for the ſame reaſon, the co-debtor of him who has been diſcharged by the confuſion, ought to remain debtor only under a deduction of the part for which he would have had recourſe againſt him.

610. If he who was creditor of Peter of a certain ſum, has transferred to me his claim, and before Peter has accepted the transfer or I have ſignified it to him, he becomes heir of Peter who is the debtor, there will indeed be a confuſion and an extinction of the debt of Peter which he has transferred to me; but as he was, by the transfer which he made to me, debtor towards me of this claim which he has transferred to me, and it is by the acceptance which he has made of the ſucceſſion of the debtor, and conſequently by his own act, that this claim which he had transferred to me has been extinguiſhed, he is bound to render me the value of it: for every debtor is bound to pay the price or the value of the thing which he owed, when it is by his own act that it has ceaſed to exiſt, as we ſhall ſee, *infra, n.* 625.

If the transfer had already been accepted or ſignified when the perſon transferring to me became the heir of

due to me, although it be fuſceptible of an obligation with regard to another.

There is a firſt example of this in the law 136, §. 1, ff. *de verb. oblig.* You bound yourſelf to give me for my plantation a right of way over the adjoining one: before this right of way is given, I have ſold my land, without ceding to the purchaſer my claim for this right of way. This claim is extinguiſhed; becauſe the right of way, which was the object of it, can no longer be due to me, as the right of way can only belong to the owner of the land.

615. A ſecond example is, when he who is creditor of a determinate thing, *lucrativo titulo*, becomes owner of it *alio lucrativo titulo*. The claim for this thing is extinguiſhed in this caſe. *Omnes debitores qui speciem ex causa lucrativa debent, liberantur, quum ea species ex causa lucrativa ad creditores pervenisset*; L. 17, ff. *de oblig. & act.*

The reaſon is drawn from our principle. When I become owner of the thing that was due me, it can no longer be due me; for one cannot owe me that which is already mine: it is repugnant that one ſhould be bound to give me that which is already mine; *nam quod meum est, amplius meum fieri non potest.* As there remains nothing that may be the object of the obligation, it cannot exiſt.

Hence this rule, *Duæ causæ lucrativæ in eamdem rem et personam, concurrere non possunt.*

617. In order that the debt may be extinguiſhed when the creditor has become owner of the thing that was due him, it is neceſſary that he ſhould have acquired a full and perfect property in that thing; otherwiſe the debt exiſts and the debtor of this thing is bound to ſupply to the creditor what is wanting for the perfection of the right of property which he has in the thing.

For example. If one has bequeathed to me a plantation which he knew did not belong to him, and, ſince his death and before the diſcharge of the legacy, the owner made a gift of it to me, reſerving to himſelf a life eſtate, the claim for that plantation, which I have againſt the heir

of the teſtator, is not extinguiſhed, although I have become owner of the thing that was due to me; becauſe ſomething is wanting to the perfection of my right, viz. the uſe of it during the life of the donor. The heir of the teſtator remains therefore debtor of this plantation, in this ſenſe that he is bound to purchaſe for me the life eſtate of the donor, or to pay me the value of it.

If the full property has been given to me, but the donation is liable to be revoked, *puta*, by the birth of children, the donor having none when he made it, there wants in this caſe ſomething for the perfection of my title, according to this rule: *Non videtur perfecte cujusque id esse, quod ei ex causa auferri potest*; L. 139, §. 1, ff. *de regul. jur.* Therefore the debtor remains bound to procure the land for me in caſe the donation which was made to me ſhould happen afterwards to be revoked by the birth of children.

618. It is neceſſary alſo that I ſhould become owner of the thing of which I was creditor, *lucrativo titulo*, that my claim may be extinguiſhed. If it were only *oneroso titulo* that I required it, *puta*, if it were ſold to me, he who was my debtor would not be diſcharged; for I ſhall not be holden to have perfectly acquired this thing, when I have paid any thing for the acquiſition of it: *Hactenus mihi abesse res videtur, quatenus sum præstaturus*; L. 34, §. 8, ff. *de leg.* I. The claim which I had for this thing does not therefore ceaſe to exiſt, ſo that I may demand to be reimburſed for what I have paid.

619. Finally that my claim may be extinguiſhed when I become owner, although *lucrativo titulo*, of the thing which was due me, it is neceſſary that my claim ſhould have proceeded likewiſe *a lucrativo titulo*; for if I were creditor *ab oneroso titulo*, *puta*, by purchaſe, my claim would not be extinguiſhed: *Quum creditor, ex causa onerosa, vel emptor, ex lucrativa causa rem habere cœperit, nihilominus integras actiones retinent*; L. 19, ff. *oblig. & act.* *Adde* L. 13, §. 15, ff. *de act. empt.*

For example. If I have purchaſed of you an eſtate

which did not belong to you, and I have ſince become proprietor of it by the donation or legacy which has been made to me of it by the true proprietor; my claim reſulting from the ſale which you have made to me of it, is not extinguiſhed. The reaſon is, that every debtor *oneroso titulo*, ſuch as is a ſeller, is obliged to guaranty the thing which he owes, and that this conſiſts in the obligation which the ſeller contracts, that the buyer ſhould have the thing in virtue of the ſale which has been made to him of it, *præstare emptori rem habere licere ex causa venditionis ipsi factæ.* It ſuffices that it ſhould not be in virtue of the ſale which you have made to me, that I hold the thing, although I be proprietor of it otherwiſe, in order that there may be room for the warranty.

620. A thing which is ſo loſt as that one is ignorant where it is, is little different from that which has ceaſed to exiſt; therefore when this loſs happens without the fault of the debtor, as when, by a violence which he could not reſiſt, the thing which he owed him has been carried away by thieves, one knows not where, the debtor is diſcharged from his obligation in the ſame manner as if the thing had ceaſed to exiſt; with this difference, however, that as a thing which has ceaſed to exiſt is not to be revived, the debtor is diſcharged from his obligation abſolutely, when the thing has ceaſed to exiſt; whereas when a thing is ſo loſt as that it may be found again, the debtor is not diſcharged in this caſe from his obligation, but while it is loſt and cannot be found.

There remains one queſtion on this ſubject. When the debtor of a thing certain, who is not chargeable for accidents, and who is liable only for loſſes which ſhould happen by his fault, alledges that the thing by him due has periſhed or has been loſt without his fault or by accident muſt the creditor prove that the loſs has happened by the fault of the debtor, or on the contrary muſt the debtor prove the accident by which he pretends it was loſt? I think we ought to decide that the debtor muſt prove the accident,

If a plaintiff is obliged to furnish the proof of what makes the foundation of his demand, the defendant is obliged likewise to furnish the proof of what makes the foundation of his defence. The creditor who demands from his debtor the payment of the thing which his debtor is bound to give him, ought to prove the claim which makes the foundation of his demand; and he proves it by producing the evidence of his claim. The debtor who pleads for his defence against this demand, that he is discharged from the debt of this thing by the accident which has caused the loss of it, ought to prove the accident which makes the foundation of his defence.

This is conformable to what Ulpian illustrates in the law 19, ff. *de prob. In exceptionibus dicendum est reum partibus actoris fungi oportere, ipsumque exceptionem velut intentionem implere, id est probare debere.*

ARTICLE II.

What kinds of obligations are subject to be extinguished by the extinction of the thing due, or when it can no longer be due.

621. It is evident that the obligations of a thing certain and determinate are extinguished by the extinction of the thing certain and determinate.

In regard to obligations under an alternative, they are not extinguished by the extinction of one of the two things which are due under an alternative; but this obligation, in an alternative as it was, becomes determinate as to the other which remains. The reason is, that in the obligation under an alternative of two things, the two things are due, *supra*, *n.* 246: it follows that there should remain one of them that there may be a thing due, and consequently a sufficient subject of the obligation.

For example. If having two horses, you have obliged yourself to give me one of the two; the death of one of them does not extinguish the obligation, and you would owe me that which remains, *non jam alternate, sed determinate.*

It is the same, if one of the things which are due me under an alternative, can no longer be due to me, *puta*, if I become proprietor of it *lucrativo titulo:* the obligation would continue for the other thing which remains. *Si Stichum aut Pamphilum mihi debeas, & alter ex eis meus sit factus ex alia causa, reliquus debetur mihi a te;* L. 16, ff. *de verb. oblig.*

The principle which we have established, that the obligation under an alternative is not extinguished by the extinction of one of the things which were due under an alternative, nor when it can no longer be due to me, takes only when this happens while the obligation is yet alternative; but if this obligation has been determined of the things, *puta*, by the offer which the debtor made, and the arrear in which he had put the creditor of receiving, in this case it is not to be doubted that the obligation would be extinguished by the extinction which happened of this thing. L. 105, ff. *de verb. oblig.*

The extinction of obligations by the extinction of the thing due, cannot happen to obligations of a sum of money, or of a quantity, as of a measure of grain, &c: nor that of a thing indeterminate, as of a cow, of a horse, without determining what cow, what horse: there cannot be in this case an extinction of the thing due, as there cannot be an extinction of what is indeterminate; *genus non perit.* Therefore the law 11, *Cod. Si certum pet.*, decides that the debtor of a sum of money is not discharged by the burning of his effects. *Incendium ære alieno non exuit debitorem:* for the money and his other effects which have perished by the fire, are not the thing which he owed; it is a sum of money, which being indeterminate cannot perish. But if the indeterminate obligation was determined to an obligation of a thing certain, by the offer which the debtor had made of it, and the arrear in which he had put the creditor of receiving, it is not to be doubted that this obligation would become from that time subject to be extinguished, by the extinction of the thing which has been offered.

623. When the obligation is not abſolutely indeterminate, and is of a thing indeterminate indeed, but which makes part of an indeterminate number of certain things, it may be extinguiſhed by the extinction of all theſe things.

For example. If one owes me a tun of the *wine which he has in a certain houſe*, and he has a hundred in this houſe; while there remains one of them, his obligation will continue: but if none of them remains, *puta*, if an inundation has carried them all away, the obligation will be extinguiſhed.

This deciſion takes place when the terms of the obligation are reſtrictive, and limit the obligation to this number of things; it would be otherwiſe if the terms were only demonſtrative. For example. If one had obliged himſelf to furniſh me a tun of wine, *to be taken from thoſe of his cellar*; although every tun which were in the cellar of the debtor, may have periſhed by accident, the obligation would not be extinguiſhed: becauſe it is not limited to thoſe tuns only which were in the cellar of the debtor. Theſe terms *to be taken*, are not reſtrictive, they are only demonſtrative; they only deſignate *unde ſolvetur*: they do not relate to the diſpoſition, they do not reſtrain it; they concern only its execution. See *in Pandect. Juſtinian. tit. de cond. & dem. n.* 235.

Article III.

What extinctions of the thing due extinguiſh the debt; when and againſt whom it is perpetuated notwithſtanding this extinction.

624. The extinction of the thing due extinguiſhes the debt, when the thing is totally deſtroyed; if there remains any part of it, the debt continues at leaſt for what remains. For example. If I were creditor of a herd of cattle which has been ſold or bequeathed to me, and one only of them remains, the others having periſhed by mortality; or if I were creditor of a houſe which has ſince been burnt; the debt of the herd would continue as to the one of them which ſhould remain, and likewiſe the debt of the houſe would con-

tinue as to the ground on which it ſtood, and the materials which ſhould remain.

625. In order that the extinction of the thing due may extinguiſh the debt, it is neceſſary alſo that it happen without the act or fault of the debtor, and before he has been put in arrear.

If the loſs of the thing due happens by the act of the debtor, it is evident that the obligation ought not to be extinguiſhed, and that it muſt be converted into an obligation of the price of this thing; for the debtor cannot by his own act diſcharge himſelf from his obligation, and make the creditor loſe his claim.

This deciſion takes place even when the debtor has deſtroyed the thing before he knew that he was debtor of it. L. 2, ff. *de verb. oblig.*

626. If the loſs of the thing due has happened not preciſely by the act of the debtor, but by his fault, becauſe he has not taken the care which he ought to have taken, the debt is not extinguiſhed, and it is converted likewiſe into an obligation of the price of the thing.

We conſider in this reſpect the fault of the debtor differently according to the different nature of the contracts from which the obligation ariſes, *ſupra*, *n.* 112.

627. In fine the loſs of the thing due does not extinguiſh the obligation, when it has happened ſince the debtor has been put in arrear to give it. L. 82, ff. *de verb. oblig.*

According to our law a debtor is put in arrear, either by the command which is ſerved upon him, when the title of the claim is with execution, or by the ſimple demand made when the title is not with execution.

In order that the loſs of the thing due, happening after the debtor was in arrear, may extinguiſh the obligation, it is neceſſary, I. that it ſhould happen whilſt he ſtill continues in arrear: for if he had ceaſed to be in arrear by actual offers made to the creditor, whereby he would have put the creditor himſelf in arrear to receive, or by ſome

agreement betwixt the creditor and debtor, the loſs of the thing due, happening ſince the debtor had ceaſed to be in arrear, would extinguiſh the obligation. The arrear of the debtor, ceaſing to exiſt, can no longer have the effect to perpetuate the obligation, notwithſtanding the extinction of the thing due. L. 91, §. 3, ff. *de verb. oblig.*

628. That the loſs of the thing due, happening ſince the arrear of the debtor, may not extinguiſh the debt, it is neceſſary, II. that the thing might not equally have periſhed with the creditor, if it had been delivered to him at the time of the demand. L. 47, §. *fin. de leg.* 1. L. 14, §. 1, ff. *depos.*; L. 12, §. 4, ff. *ad exhib.*; L. 15, §. 5, ff. *de rei vind.* For the arrear of the debtor perpetuates the debt, notwithſtanding the extinction of the thing due, only by way of damages. If the creditor has not ſuffered from the delay of the debtor, damages are not due him: it is evident that he has not ſuffered, if the thing would equally have periſhed with him.

It is eaſily preſumed that the thing would not equally have periſhed with the creditor, if the creditor was a merchant who bought it to ſell again.

If the thing periſhed by fire in the houſe of the debtor, it is evident that it would not have periſhed if it had been delivered to the creditor.

No enquiry is made whether the thing would equally have periſhed with the creditor, in regard to the reſtitution of things due from thoſe who ſtole or took them by violence; they are bound without diſtinction for the price of the thing, when it has periſhed in their hands. L. *fin.* ff. *de cond. furt.* L. 19, ff. *de vi & vi arm. quod ita receptum odio furti & violentiæ.* Note alſo, in regard to thoſe perſons, that they are conſidered in arrear from the day of the theft or taking, without the neceſſity of any previous demand.

629. When the thing due has periſhed by the act or fault of the principal debtor or ſince his arrear, the debt of the price of this thing exiſts not only againſt him and

his heirs, but even againſt his ſecurities, and in general againſt all thoſe who have acceded to his obligation. L. 91, §. 4, 5, ff. *de verb. oblig.* L. 58, §. 1, ff. *de fidejus.* L. 24, §. 1, ff. *de usur.* Paul gives this reaſon for it: *Quia in totam causam spoponderunt.* The ſecurities, in becoming for the principal debtor ſecurities for the principal obligation to give the thing, are conſidered to have likewiſe become ſecurities for the ſecondary obligation which reſults from the principal obligation, ſuch as that of keeping the thing with proper care until the delivery, and generally to uſe good faith and due fidelity in the performance of the principal obligation; they cannot be diſcharged from their obligation by the loſs of the thing, when this loſs happened by the fault of the principal debtor, or ſince he was in arrear; while being, as we have ſaid, ſecurities for the care which he was to take in the keeping of the thing, and of the fidelity with which he was to perform his obligation, they are anſwerable for the fault through which this debtor has ſuffered the thing to periſh, and for the unjuſt delay by which he has contravened the fidelity which he ought to have uſed in the performance of his obligation.

Thoſe principles appear contrary to the rule of law, *unicuique sua mora nocet.* L. 173, §. 2, ff. *de reg. jur*; for it ſeems to follow from this rule that the delay of the principal debtor can only prejudice him and not the ſecurities. Cujas and the other commentators reconcile this rule with our principles by this diſtinction: the delay of the principal debtor cannot it is true prejudice his ſecurities ſo as to add to their obligation; *non nocet ad augendam obligationem.* For example. In debts of a ſum of money, the arrear of the debtor cannot prejudice the ſecurities who are only bound for a certain determinate ſum, ſo as to render them liable for the damages which become due by this debtor from the day he becomes in arrear; for the delay of the debtor does not prejudice the ſecurities *ad augendam eorum obligationem:* it cannot then bind for the damages theſe ſecurities, who are bound only for the principal ſum. This is the caſe of the law 173. But in debts of a thing certain,

the arrear of the debtor may prejudice the securities whose securitiship is unlimited, so as to perpetuate their obligation, and to prevent them from being discharged by the loss of the thing, happening since the arrear; *non nocet ad augendam obligationem, sed nocet ad perpetuandam obligationem.*

630. *Contra, vice versa*, if the thing has perished by the act or fault of the security, or since he has been put in arrear, the security alone will remain bound for the price of the thing: the principal debtor will be discharged by the extinction of the thing; L. 32, §. *fin.* ff. *de usur.*; L. 49, *de verb. oblig.* The reason of this difference is, that the security is indeed bound for the principal debtor; but the principal debtor is not bound for the security; and consequently he cannot be holden to the obligation which the security has contracted by his own act, by his fault or arrear.

631. If the thing due has perished by the act or fault of one of the co-debtors *in solidum*, or since his arrear, the other co-debtors will be bound therefor; L. 18, ff. *de duobus reis.* See what we have said in treating of obligations *in solidum*, *supra* n. 273.

If the thing had perished by the act or by the fault of one of the heirs of the debtor, or since his arrear, his co-debtors will not be bound therefor; L. 48. §. 1, ff. *de leg.* 1: for although, as holding the estate, they are bound with hypothecation for the whole debt, they are personally bound each only for their parts; they are not between themselves debtors *in solidum*, they are not bound one for the other.

632. The principle which we have established, that the debtor of a thing certain is discharged from his obligation when the thing has perished without his act or fault, and before he has been put in arrear, receives an exception in the case in which the debtor makes himself by a particular clause of the contract liable for the risque of accidents. For example. If I have given a stone to a lapidary to cut, and it be broken without any fault of the workman, but by the defect of the thing itself; although regularly this loss, which has happened without his fault and by

a ſort of accident, ought to diſcharge him from the obligation which he has contracted to reſtore to me this ſtone, yet if by a particular clauſe in our bargain, he has charged himſelf with this riſque, he will not be diſcharged; he will be bound to pay me the price of this ſtone. It is the ſame of the law 13, §. 5, ff. *locat.* Theſe agreements, by which a debtor charges himſelf with accidents, have nothing contrary to the equity which ought to reign in contracts, eſpecially when the debtor who charges himſelf with this riſque, receives from the other party ſomething equivalent to the eſtimation of the riſque with which he charges himſelf; for theſe riſques are ſomething appreciable. For example. In the inſtance juſt propoſed, the lapidary who has taken on himſelf the riſque of the thing is preſumed to be compenſated for it by a price for his work, greater than it would have been if he had not charged himſelf with this riſque.

Likewiſe in the contract of loan to uſe, when the borrower takes upon himſelf the riſque of accidents in regard to the thing which is lent him, as in the inſtance of the law 1, *Cod. commod.*, he is compenſated for this riſque which he takes upon himſelf, by the enjoyment of the thing which the lender was not obliged to lend him gratuitouſly, and which he might have hired to him.

In the contract of pledge, the creditor who takes on himſelf the riſque of the things given him in pledge, as in the inſtance of the law 6, *Cod. de pign. act.*, is compenſated for the riſque by the aſſurance which he procures himſelf; the perſon giving the pledge being only his debtor, who was not obliged to give him pledges, was not obliged to procure it for him.

Even when the debtor who has charged himſelf with the riſque of accidents, ſhould not receive any thing for this riſque with which he is charged; if, in taking it on himſelf, he intended to exerciſe a liberality towards the other party, the clauſe does not contain in this caſe any injuſtice. If on the contrary the debtor, not intending to exerciſe any

liberality, but to receive as much he gave, has taken on himself the risque of accidents, the clause, in *foro conscientiæ*, is unjust, when he does not derive any advantage from the bargain, which might be equivalent to this risque with which he is charged: in *foro legis* he is presumed to be compensated.

A debtor may take on himself not only the risque of a certain kind of accidents, as in the instance of the law 13, §. 5, ff. *locat.*, just mentioned; he may also charge himself generally with every accident by which the thing may perish, as in the instance of the law 6, *Cod. de pign. act.* However general the clause may be, it comprehends those only which may be prevented by the parties, and not those which they could not prevent, and which they could not guard against; *arg.* L. 9, §. 1, ff. *de transact.* Guthier, *Tr. de Con. jur.* §. 24, thinks that this decision ought to take place even when the clause should be expressed in these terms, *to be liable for all accidents, foreseen and unforeseen.* See our treatise on the contract of hire, *part* 3, *ch.* 1, *art.* §. 5, where we have treated at large of all these clauses.

Article IV.

Whether the obligation which is extinguished by the extinction of the thing due, is so extinguished as that it does not continue for the part which remains of this thing, nor for the rights and actions which the debtor has in regard to this thing.

633. When the extinction of the thing due is not a total extinction, and there remains some part of this thing, it cannot be doubted in this case that the obligation continues for the part which remains of the thing due. For example. If you were debtor to me of a herd of cattle which has perished by a mortality and of which there remains but one; or if you were debtor to me of a house which has been consumed by lightning; it is not to be doubted that you would continue towards me debtor of the one which remains of the herd, or of the ground and materials which remain of the house: for the one which remains of the

that it ought to extinguish totally the obligation; I maintain that it ought to continue in what remains of this thing. It is ill reasoning, and a begging of the question, in those who urge the reasons to doubt, to have advanced the contrary as a principle; since it is precisely what is in question. In fine, it is said that the debtor was obliged to give the ox which was living at the time of the contract, and that he is not obliged to give the hide which might remain after the death of the ox. I answer, that he is not obliged *formaliter* to give this hide; but he is obliged to do so *implicite et eminenter*; the obligation to give a thing containing *eminenter* whatever this thing includes and contains, and consequently whatever may remain of it, after the extinction of the thing. In regard to the law 49, ff. *de leg.* 2, which they plead, by which it is said that when the ox which has been bequeathed to me is dead, the legatee may not demand of it either the hide or the flesh, the answer is that we must necessarily suppose, in the instance of this law, the ox to be dead before the legacy took effect and became due, that is to say in the life-time of the testator, if absolute, or before the accomplishment of the condition, if conditional. For if the ox was not dead till after the legacy took effect and became due, the property having been transferred to the legatee, it cannot be doubted that all which should remain of the ox would belong to him. According to the rule of law, *meum est quod ex re mea superest; ideoque vindicari potest.* L. 49, §. 1, ff. *de rei vind.* In supposing, as it ought necessarily to be supposed, that the ox died before the legacy became due, nothing can be inferred from this law against our decision; for if it be decided by this law that the legatee cannot demand what remains of the ox, it is not because the death of the ox has totally extinguished the debt: since as the ox was dead before the legacy became due, this debt never could be contracted; but it is because the legacy could have no effect, the death of the testator not being able to confirm the legacy of that which did not exist.

The obligation exists also after the extinction of the thing due, in that which was its accessory. For example. If you were debtor to me of a horse and furniture, and the horse died since the contract, without your fault, I am well grounded in demanding the harness of this horse which has remained with you. The law 2, ff. *de pecul. leg.*, is not contrary to this decision. It is there said, *Quæ accessionum locum obtinent extinguuntur, quum principales res peremptæ fuerint.* The answer is, that this rule takes place when there has been as yet no obligation contracted. This law is in the instance of a slave who having been bequeathed with his *peculium*, died before the legacy became due. The *peculium* not being bequeathed *per se*, but as an accessory to the legacy of the slave, and the legacy of the slave having no effect, the whole lapsed. In this case there was yet no obligation contracted; but when once the obligation of a thing with its accessories has been contracted, the creditor having acquired a right, *jus ad rem*, to the accessories as well as to the principal thing, he ought to retain it even after the extinction of the principal thing.

634. When, without the fault of the debtor, the thing which he owed has perished or become not a subject of commerce, or is lost so that one does not know what has become of it; if the debtor has any rights or actions relative to this thing, his obligation continues so as to bind him to subrogate his creditor to the said rights or actions. For example. If you were my debtor of a horse which without your fault has been killed by a third person, or has been taken away by violence, without its being known what has become of the horse, you will indeed be discharged from the obligation to deliver the horse; but you will be bound to subrogate me to the actions which you have against those who killed or carried the horse away. Likewise, if you were debtor to me of a piece of ground which has since been taken for a public square, you will be discharged towards me with regard to the ground; but you will be bound

to fubrogate me to the indemnity which you have a right to claim: it will remain with me to profecute it at my coft and for my benefit.

CHAPTER VII.

Of several other ways in which obligations are extinguished.

ARTICLE THE FIRST.

Of time.

635. REGULARLY time does not extinguiſh obligations; thoſe who bind themſelves, bind forever themſelves and their heirs, until the perfect performance of their obligation.

It may however be validly agreed that one ſhall be bound only until a certain time. For example. I may be a ſecurity for one with a clauſe that I ſhall not be holden to my ſecuritiſhip longer than for three years.

By the civil law, the agreement by which the debtor ſtipulated that he ſhould be bound only for a certain time, or until the event of a certain condition, although valid, did not however procure at the end of this time, or on the happening of the condition, the extinction of the debt *de jure*; but it gave to the debtor a plea againſt the demand of the creditor, *exceptionem pacti*. L. 44, §. 1, & 2, ff. *de oblig. & act.*; L. 56, ff. *de verb. oblig.* §. 4. The reaſon which the juriſts give for it is, that obligations once contracted, cannot be extinguiſhed but in the natural or lawful ways in which obligations are extinguiſhed; and that the lapſe of time or the happening of a condition are not ſuch ways of extinguiſhing them. Our law does not admit of theſe ſubtilties and we conſider the debt extinguiſhed *de jure* by the expiration of the time to which the debtor intended to limit his obligation.

If he who is obliged only for a certain time had been put in arrear of paying, by a ſuit before the expiration of

the time, he would remain obliged for ever, and could not be discharged but by payment; for the unjust default which he has made, ought not to be profitable to him and injurious to the creditor; L. 59, L. 5, *mandat.* This is conformable to this rule of law: *Omnes actiones quæ morte aut tempore pereunt, semel inclusæ judicio, salvæ permanent;* L. 39, ff. *de reg. jur.*

Observe that in instruments of writing which express that one of the contracting parties has bound himself for a certain time, it is necessary to pay good attention to what has been intended by the parties. For example. If Peter has borrowed of you the sum of one hundred livres, which he binds himself to return you on your demand, and it is expressed that I become a security for him for this sum during the period of three years only, it is evident that the meaning of this clause is, that if during the said time I have not been put in arrear to discharge this debt, I shall, at the end of the said time of three years, be discharged *de jure* from my securitiship; as the clause in this case can have no other meaning. But if in a lease which you have made for the term of six years, it is expressed that I become a security for the lessee, for the term of *six years only*, this would not signify that at the end of six years I should be discharged and acquitted from my securitiship, although the obligations of the lease should not be discharged; but these terms should be understood in this sense, that by the precaution and although it might not be necessary to be so explicit, I meant thereby to declare that I intended to become a security only for the obligations of this lease which would endure for six years, and not for the leases which you might, after the expiration of this time, renew to this lessee, either expressly or impliedly.

Article II.

Of resolutive conditions.

636. In the same manner as one may contract an obligation with a clause that it shall endure only for a certain time, one may also contract an obligation with a clause

that it shall endure only till the event of a certain condition; as when, in becoming a security for Peter, I have stipulated that I would bind myself for him until the return of a certain vessel in which he has a large interest; my obligation endures only until the return of the vessel: the return of the vessel extinguishes it.

We call this kind of condition a resolutive condition. See what we have said *supra*, *part* 2, *ch.* 3, *art.* 2.

In synallagmatic contracts, which contain the reciprocal engagements between each of the contracting parties, they often put for a resolutive condition of the obligation which one of the parties contracts, the inexecution of some one of the engagements of the other.

For example. If I sell you my wine with a clause that if you do not come to take it away and pay me in eight days, I shall be discharged from my obligation; this is a resolutive condition.

According to the simplicity of these principles, the single lapse of the time limited by the contract, in which you ought to satisfy the condition, when it has passed without your having satisfied it, ought to extinguish and dissolve my engagement in all these and similar cases. Yet in our practice, it is usual to cite the creditor by an officer, to satisfy the condition, or appear before the judge and shew cause why the engagement should not be declared null, for his default of satisfying it.

Even when we have not expressed in the agreement the inexecution of your engagement, as a resolutive condition of that which I have contracted towards you, yet this inexecution may often operate the dissolution of the bargain, and consequently the extinction of my obligation. But it is necessary that I should procure this dissolution to be pronounced by the judge, upon notice which I ought to give you to this effect. Suppose for example, that I have sold you my library absolutely: if you delay to pay me the price of it, the inexecution of the engagement which you have contracted to pay me the price agreed, will give room for

the extinction of that which I have contracted to deliver you my library. But this extinction of my engagement will not be made *ipso jure*; it will be made by the sentence which will intervene upon the notice which I shall give you, to shew cause why, on your default in taking away my library and paying me the price of it, the bargain should not be annulled. It is in this case at the discretion of the judge to allow you such delay as he may think proper to satisfy your obligation, after which I may obtain a judgement by which the dissolution of the bargain will be pronounced and I be discharged from my engagement.

Article III.

Of the death of the creditor and of the debtor.

§. I.

General rules.

637. Regularly claims are not extinguished by the death of the creditor; for he stipulates or is presumed to stipulate as well for his heirs and other universal successors as for himself.

Therefore the claim by the death of the creditor passes to his heirs who succeed to all his rights; and if he has no heirs, the claim is supposed to reside in the vacant succession, which in this respect *personæ vicem sustinet defuncti.*

Likewise, the obligation is not extinguished by the death of the debtor; for we are presumed to bind ourselves as well for our heirs and all other successors as for ourselves. Therefore when the debtor dies, the obligation passes to his heirs, who succeed to all his rights, active and passive; and if he leave no heirs, it resides in the vacant succession which represents him.

The principle that obligations pass to the heirs of the debtor, and the rights which result therefrom to the heirs of the creditor, applies not only in regard to obligations which are to give something, but also to those which are to do something, according to the constitution of Justinian in the law 13, *Cod. de cont. & comm. stipul.*

§. II.

Of claims which are extinguished by the death of the creditor.

638. There are however certain claims which are extinguiſhed by the death of the creditor; ſuch are thoſe which have for their object ſomething which is perſonal to the creditor; as if one binds himſelf to grant me the uſe of a certain book as often as I ſhould require it, or to accompany me in the travels which I ſhould perform; theſe things which make the object of my claim being perſonal to me, my claim would be extinguiſhed by my death.

But if on the default of the debtor to perform his obligation, I had obtained a judgment againſt him for the damages, this right to damages, into which my claim is converted, would paſs to my heirs.

A claim for the reparation of an injury is extinguiſhed alſo by the death of the perſon injured, when he has not, during his life, brought any ſuit therefor: he is preſumed in this caſe to have remitted and pardoned the injury; L. 18, ff. *de injur.*

Annuities are alſo debts which are extinguiſhed for the future by the death of the creditor, when they have been conſtituted on his life; but the debt of arrearages which have run till the day of his death, paſſes to his heirs.

§. III.

Of claims which are extinguished by the death of the debtor.

639. There are alſo ſome debts which are extinguiſhed by the death of the debtor; ſuch are thoſe which have for their object ſomething perſonal to the debtor, as when one has bound himſelf to have another in the quality of ſhepherd, or in any other quality.

If the debtor, in default of performing this kind of obligation, has ſuffered a judgment for the damages, this obligation, which ſucceeds to his principal and original obligation, paſſes to his heirs.

Excepting the caſe of perſonal acts, he who has promiſed to do ſomething, and is dead without having done

t, although he has not been put in arrear of doing it, transmits his obligation to his heirs, who are obliged to do what the deceased was obliged to do.

By the civil law, obligations which arose *ex delicto*, were extinguished, for the most part, by the death of the debtor, when the demand had not been brought to a judgment against him in his life-time, and they did not pass to his heirs; except to the amount of what they had profited by them in their succession to the deceased. They had only the action which was called *condictio furtiva*, to demand the thing stolen, which was given against the heir of the thief, even when the heir had not profited by it. L. 19, ff. *de cond. furt.*

The principles of the canon law are different. It is only the penalty due for the trespass, which is extinguished by the death of him who has committed it; but the obligation to repair the injury which one has committed *ex delicto*, passes to his heirs. This is the decision of *cap. fin. de sepult.* and of *cap.* 5, 10, *de rapt.* We have on this point preferred, as most equitable, the principles of the canon law, to those of the civil law; and in our practice although the heirs of him who has committed a tort have not profited by it, they are liable for the damages due to him towards whom it has been committed; even when he had not brought his action against the deceased. This is attested by *J. Fab.* upon the *Instit. tit. de act.* §. *pœnales*; and by d'Argentre, *art.* 189, of the custom of Brittany.

CHAPTER VIII.

Of pleas in bar and prescriptions against claims.

ARTICLE THE FIRST.

General principles on pleas in bar and prescriptions.

640. PLEAS in bar against claims, are pleas shewing certain causes which prevent the creditor from being heard in court to make his demand.

The firſt kind of pleas in bar is the authority of the thing judged, *rei judicatæ*. When a debtor has had a judgment againſt the complaint of the creditor, there reſults from this judgment a plea in bar againſt the creditor, which diſables him from ſuing for the debt; unleſs he cauſes the judgment to be ſet aſide by a writ of error or appeal, when the judgment has not yet had the force of the thing judged: or, when it has acquired the force of the thing judged, by having it revoked in the tribunal of errors, if the caſe be ſuch as that it could be brought there. With regard to caſes in which a judgment is preſumed to have obtained the force of the thing judged, and as to caſes in which judgments which have obtained the force of the thing judged, may be ſet aſide by the tribunal of errors, ſee the ordinance of 1667, *t.* 27, *art.* 5, & *t.* 35. This plea in bar is called in the civil law *exceptio rei judicatæ*, on which ſee the the Digeſt, *tit. de excep. rei jud.*

A ſecond plea in bar is that which reſults from the deciſory oath of the debtor who has ſworn that he owed nothing, when this oath was deferred to him by the creditor. There reſults from this oath a plea in bar called *exceptio jurisjurandi*, which prevents the creditor from being received to proſecute his demand, notwithſtanding any proof he may have obtained ſince. We will treat of this oath *infra, part.* 4, *ch.* 3, §. 8, *art.* 1.

641. A third plea in bar is that which reſults from the lapſe of the time within which the law has confined the duration of the action which reſults from the claim. We call this kind of plea properly *preſcription*; although the term preſcription be a general expreſſion which may alſo ſuit all other pleas in bar.

It is of this kind of pleas in bar which we ſhall treat of in the ſequel of this chapter.

642. Pleas in bar do not extinguiſh the claim but they render it ineffectual, in rendering the creditor not receivable to bring the action which reſults from it.

Beſides this, although pleas in bar do not extinguiſh

the claim *in rei veritate*, yet they cauſe it to be preſumed to be extinguiſhed and diſcharged, while the plea in bar exiſts.

Therefore when the debtor has acquired a plea in bar againſt my claim, not only am I unable to bring an action againſt him, I cannot even oppoſe to him this claim as a ſet-off againſt the claim which he may on his part have acquired againſt me ſince the plea in bar acquired againſt mine; for the plea in bar which exiſts againſt my claim, induces a preſumption of the extinction of my claim.

But if my debtor of a ſum of money, before the time of the preſcription againſt my claim was accompliſhed, and conſequently before the plea in bar was acquired, had become my creditor of a like ſum of money, and afterwards, ſince the time of the preſcription againſt my claim was accompliſhed, ſhould demand the payment of his; although I ſhould not be receivable to bring an action againſt him for mine, I would be receivable to oppoſe it to him as a ſet-off againſt his. This is according to this maxim: *Quæ temporalia ſunt ad agendum, perpetua ſunt ad excipiendum.* The reaſon is, that as the ſet-off is made *ipſo jure*, *ſupra*, *n.* 599, from the time that you became my creditor, your claim and mine which was not yet preſcribed, were mutually deſtroyed by the ſet-off and extinguiſhed.

From the principle that the plea in bar while it exiſts, cauſes the claim to be preſumed to be extinguiſhed, it follows alſo that one would ineffectually become a ſecurity for a claim which is already barred. Add that the ſame pleas *in rem* which may be oppoſed againſt the principal obligation by the debtor, may be oppoſed by the ſecurity.

Pleas in bar ought to be pleaded by the debtor: the judge cannot ſupply them.

They may be waved by the renunciation which the debtor makes of them whether expreſsly, or tacitly.

Theſe pleas in bar, being thus waved, cannot afterwards arreſt either the execution or the demand. A plea in bar cannot be more effectually waved than by the pay-

ment which the debtor makes of the debt. As the plea in bar had not extinguiſhed the debt, it cannot be doubted that the payment would be valid. Yet if the debtor who had paid the debt was a minor, he might procure a reſtitution againſt this payment, as alſo againſt all other renunciations which he ſhould make of pleas in bar that had been acquired by him.

Article II.

Of the preſcription of thirty years.

643. Regularly the actions which ariſe on claims ought to be brought within the time of thirty years. When the creditor has ſuffered this time to elapſe without bringing his action, the debtor acquires againſt him a preſcription which renders the creditor not receivable to make his demand.

§. I.

On what reaſons it is founded.

644. This preſcription is founded, I. on a preſumption of the payment or releaſe of the debt, which reſults from this lapſe of time; as it is not common that a creditor ſhould delay for ſo conſiderable a time to cauſe himſelf to be paid what is due him: and as preſumptions are derived *ex eo quod plerumque fit*; Cujas, *in parat. ad tit. de prob.*; the laws have hence derived a preſumption that the debt has been diſcharged or releaſed.

Beſides, the care which a debtor muſt take to preſerve the acquittances which are the proof of the payment he has made, ought not to be neceſſary for ever; and a time ſhould be fixed after which he ſhould not be required to ſhew them.

II. This plea in bar is alſo eſtabliſhed as a penalty for the negligence of the creditor. The law having given him a certain time in which he might bring the action which is given him to cauſe himſelf to be paid, he is not entitled to be heard when he has ſuffered this time to paſs.

§. II.

When, and against whom it runs.

645. It refults from what has juft been faid, that the time of the prefcription cannot begin to run, but from the day when the creditor has had power to bring his action; for it cannot be faid that he has delayed to fue while he was unable to bring fuit. Hence this general maxim on the fubject: *Contra non valentem agere, nulla currit prescriptio.*

Hence it follows that the time of the prefcription cannot run while the action is not yet open and the claim is yet fufpended by a condition, the event of which it waits.

Although the right of the creditor be already complete and the action has arifen, if there was a time of payment, the time of the prefcription cannot begin to run but from the day of the completion of this time; becaufe the creditor could not fooner effectually demand it.

When a debt is payable at feveral times, I fee no difficulty in faying that the time of the prefcription begins to run from the day of the expiration of the firft time, for the part of the debt which was payable at this time; and that it does not run for the other parts till the day of the expiration of each of the other times in which they are payable. For example. If you owed me the fum of three thoufand livres, payable in three times, from year to year, of which the firft payment fhould be to be made on the firft of January, 1735, the time of the prefcription would begin to run for the firft third part of the debt from the faid firft of January, 1735; for the fecond third part from the firft of January, 1736; for the laft third part from the firft of January, 1737; and the debt would be barred for one third part in 1765, for another third part in 1766, and for the remainder in 1767.

646. From our principle that the time of the prefcription cannot run while the creditor has not power to bring fuit for his demand, it follows further that the time of the prefcription cannot run, while the marriage continues, againft the claims which a feme covert, although with a fe-

paration of property, has againſt her huſband; for being under his power, ſhe is during this time prevented from bringing a ſuit againſt him.

It is the ſame of claims and actions which ſhe ſhould have againſt third perſons, if theſe third perſons had a recourſe againſt the huſband to be diſcharged from them: for in this caſe the wife is preſumed to have been prevented by her huſband from ſuing on account of the recourſe which the debtor had againſt him. Excepting this caſe, the time of the preſcription runs during the time of the marriage, againſt the claims which the wife has againſt third perſons.

The time of the preſcription cannot run againſt the beneficiary heir for the claims which he has againſt the beneficiary eſtate; for he cannot bring a ſuit againſt himſelf.

647. The preſcription does not run againſt minors, although they have a tutor. This is not by the rule, *contra non valentem agere, non currit prescriptio*, ſince they have a tutor who may bring their actions for them. A particular favor, which this age requires, excepts minors from the law of preſcription. The cuſtom of Paris and of Orleans have regulations reſpecting it: they except minors from the law of preſcription, in ſaying that it runs againſt *persons of age*.

When the creditor leaves heirs of whom ſome are of age and others minors, if the claim has for its object ſomething diviſible *natura aut saltem intellectu*, as if it is a claim for a certain eſtate; the time of the preſcription which does not run againſt the minors for their part of the claim, does not ceaſe to run againſt thoſe of age for their parts.

But if the claim is indiviſible, as if I have promiſed ſome one to give for the benefit of his houſe a right of way, while one of the heirs ſhould be a minor, the time of the preſcription would not run at all even againſt thoſe of age becauſe, as the debt is indiviſible, not ſuſceptible of parts, it cannot be barred for part. It is in this caſe that it is ſaid that the minor relieves the major *in individuis*.

648. Another queſtion is aſked. Does the time of the preſcription run againſt idiots or perſons inſane?

Theſe perſons are either provided with curators or they are not. When they are not, they are within the rule, *contra non valentem*, &c. and it is not to be doubted in this caſe that the preſcription could not run againſt them. The queſtion falls then upon idiots who are provided with curators. We may ſay in their favor, in order to except them from the law of preſcription, that the law has excepted minors from it, although provided with tutors: theſe perſons are commonly compared to minors; they are ſtill more incapable than minors of watching the preſervation of their property: their condition is worthy of compaſſion and of the protection of the laws. Therefore it ſeems that the exception from the law of preſcription, which has been granted to minors, ought to be extended to theſe perſons. *Catelan*, *t.* 11, *l.* 7, 13, reports a caſe in his parliament, in which it was ſo adjudged.

The reaſons which may be brought for the contrary opinion are, that the laws in excepting minors from the law of preſcription, have in this granted them a privilege: it is of the nature of privileges granted to a certain claſs of perſons, not to be extended to others even under the pretext of a parity of reaſon. It may even be ſaid that there is not here entirely a parity of reaſon. The law could very eaſily except from the preſcription the time of minority, becauſe this time has certain limits; whereas, as the infanity of a perſon continues commonly all his life, which may go to eighty or a hundred years, the preſcription ſo neceſſary for the tranquillity of citizens, would often be arreſted during too long a time, if idiots were excepted from the law of preſcription. Add that minors being the hope of the ſtate, there is a reaſon to aid them which does not operate in regard to other perſons. This opinion may be ſupported by the authority of the commentary upon the *chap.* 13, *extra*, *de præscript.*, which in reporting all the caſes againſt which the preſcription does not run, does not comprehend in it idiots or perſons inſane. Bretonnier on *Henrys*, *t.* 2, 4, 21, appears to incline to this opinion.

649. When a perſon is abſent in a diſtant country, for example in the Eaſt-Indies; although the perſon who had his power of attorney in his own country was dead, and there was no perſon who could take care of his affairs, the time of the preſcription does nevertheleſs run againſt him: he is not for this reaſon within the rule, *contra non valentem*, &c.: for however diſtant he might be it is not impoſſible for him to inform himſelf of the news of his country, and to ſend a power of attorney to another perſon in the ſtead of him who is dead. See *Catelan*, as above cited.

Circumſtances may however happen in which a perſon abſent has been under an actual diſability, and when this is evidently proved, we may aid him by applying the rule *contra non valentem*, &c.

650. The time of the preſcription runs againſt an eſtate, although vacant, abandoned and deſtitute of a curator: for the creditors of this eſtate, who are thoſe who have an intereſt in preſerving the rights of this eſtate, had it in their power to name a curator to this eſtate; therefore they cannot avail themſelves of the rule *contra non valentem*, &c.

Henrys has thought that the preſcription ought not to run againſt the rights of an eſtate while the heir has uſed the delay which the ordinance gives him to deliberate. This opinion has not had followers. The heir during this time had the power, without being bound thereby, to aſſume the quality of heir, to make uſe of all the conſervatory actions and to interrupt the preſcription: he is not therefore within the rule *contra non valentem*, &c.

651. The preſcription takes place even againſt the king's farmers, for the claims depending on the rights which are farmed to them. *Nec obſtat* that there is no preſcription againſt the king: for this maxim relates only to the funds of the king's domain which are impreſcriptible; but the claims of the farmers of the king, which concern the rights that are farmed to them, are not the funds of the king's domain: they are only the fruits, and the fruits are the property of the farmers.

The king indeed is not himself subject to any human law, consequently not to that of prescription: but his farmers are subject to his laws, and consequently to that of prescription, as well as to all others, and they ought to bring suit for their demands within the time prescribed by the laws.

652. The prescription of thirty years does not take place against the church, but only that of forty years, of which we shall speak *infra*.

Observe that it is the church rather than the beneficiary, which is exempted from the prescription of thirty years. Therefore this prescription is not rejected but when it operates against the ground itself of the claim. But the arrearages of annuities due to the church, the rents, profits, and other like claims, which concern rather the personal advantage of the beneficiary than the church itself, are subject to the prescription of thirty years. When the church succeeds to the claim of an individual, it ought to make use of the same right as this individual had, for the time the claim belonged to him, according to this rule: *Qui alterius jure utitur, eodem jure uti debet.*

The time of the prescription therefore ought only to be augmented in proportion to the time which remained to run when the church had succeeded to an individual. Therefore as ten years are added to the time of the ordinary prescription of thirty years, which is the third part on from the time of the prescription when it began to run against the church; so, when it has begun to run against an individual to whom the church has succeeded, one ought to add to the time of the prescription the third part on from the time which remained to run when the church succeeded to this individual. For example. If fifteen years had already run against an individual since the time of the prescription began to run, it would not be necessary to add ten years to the fifteen which remained to run, but only five years, the third of the fifteen which remained, and the prescription would be accomplished at the end of thirty-five years.

Vice versa, when an individual has acquired a claim of the church, the individual ought to enjoy, for the paſt, the privilege of the church as to the preſcription of forty years, and the time of the preſcription ought not to be reduced to the preſcription of thirty years, except for the future. For example. If twenty years had run againſt the church when the individual acquired the claim of the church, the time of twenty years being but half of that which is neceſſary againſt the church, there would be wanting for the accompliſhment of the preſcription, the other half of the time, not of that which is neceſſary againſt the church, but of that which is neceſſary againſt individuals; that is to ſay, there would be wanting fifteen years more. The time of the preſcription againſt individuals being leſs by a fourth than that of the preſcription againſt the church, when an individual ſucceeds to the church, we muſt ſubtract the fourth of the time which would remain to run againſt the church if the claim had always continued to belong to it. Therefore in the inſtance propoſed, we have ſubſtracted five years from the time of twenty which remained to run againſt the church when the individual ſucceeded to the church.

Secular corporations have the ſame privilege as the church and are barred only by the preſcription of forty years; *Troucon on Paris; Lemaitre*, &c.

§. III.

Of the effect of the prescription of thirty years.

653. The effect of this preſcription is, that when it is accompliſhed, the debtor againſt whom the creditor ſhould bring a ſuit after the accompliſhment of the preſcription, may in oppoſing to the creditor this preſcription, cauſe him to be declared not receivable in his demand.

654. May the creditor however in this caſe defer to the debtor the oath upon the payment? No: for this preſcription is not only eſtabliſhed upon the preſumption of payment which reſults from the long time which has paſſed; it is alſo eſtabliſhed as a penalty for the negligence of the creditor. The law having limited the time of the duration of

the action which it gives, after the expiration of this time, the creditor has indeed preserved his claim, if it has not been discharged, but he has no longer an action: he has no longer *jus persequendi in judicio quod sibi debetur*, and consequently he has no longer the right to exact from his debtor the oath which makes part of this right of action.

655. The prescription, whether begun or accomplished against the creditor, takes effect against his heirs and other successors, whether by a general or particular title, so that it would no longer remain to them to demand the payment of the claim but for the time which remained when they succeeded to him; and if it has been accomplished against the creditor, the same plea in bar which took place against him, ought to take place against them. This is evident: for being in the rights of the creditor, holding from him all the rights which they can have, they cannot have more than he could have had himself. *Nemo plus juris in alium potest transferre, &c.*

656. There is more difficulty in regard to the substitute. May the time of the prescription which has run before the vesting of the substitution against the heir, for a claim of the succession which makes part of the property comprised in the substitution, after the vesting of the substitution, be imputed to this substitute? The reason to doubt is, that this substitute does not hold his right to the property substituted, from him who was charged with the substitution for his benefit, and against whom the time of the prescription has run. Nevertheless it must be decided that the prescription, whether commenced or accomplished against the person charged, likewise takes effect against him: for although the substitute does not hold his right from the person charged, but from the testator who has made the substitution, yet this claim passes from the person charged to that of the substitute; and it cannot pass but such as it is, and consequently barred by the prescription in part or entirely, if it was so in the life of the person charged. The

person charged having been the true creditor until the vesting of the substitution, it is against him that the time of the prescription ought to run and in fact has run. The person charged would not have power *faciendo*, in disposing of this claim, transferring, hypothecating it, to prejudice the substitute: because he cannot transfer it but as he has it, and consequently *cum causa fideicommissi*, with the charge of the substitution: but he may, *non faciendo, non utendo*, suffer the action which resulted from this claim to perish. This is the precise disposition of the law 70, §. *fin.* ff. *ad Trebell. Si temporalis actio in hæreditate relicta fuerit, tempus quo hæres experiri ante restitutam hæreditatem potuit, imputabitur ei cui restituta fuerit.*

It is true that the law does not speak of actions limited to a number of years, because in the time of the jurists from whom we have this law, common actions were not subject to the prescription of any lapse of time: but since they have been subjected to the prescription of thirty years, there is the same reason so to decide. This is also the opinion of Ricard, *Tr. Subst. p.* 2, *ch.* 13, *n.* 93, 94.

657. The prescription has not only effect *in foro legis*, it may sometimes have effect *in foro conscientiæ*. The debtor who cannot be ignorant that he has not paid, may not indeed *in foro conscientiæ* have recourse to the prescription, and it is for this that it is called *improborum præsidium*: but as the prescription forms a presumption that the debt has been discharged, the heirs of the debtor may even *in foro conscientiæ* presume that the debt has been discharged and consequently avail themselves of the prescription, when they have no knowledge or just cause to believe that the debt has not been discharged.

§. IV.

How prescriptions not yet accomplished, are interrupted.

658. The time of the prescription is interrupted either by the acknowledgment which the debtor makes of the debt, or by a judicial demand.

By whatever instrument the debtor acknowledges the

debt, it interrupts the time of the prescription, whether it be passed with the creditor or without him. For example. If in the inventory of the property of the debtor the debt is comprised among the passive, this inventory, although it be not made with the creditor, is an act acknowledging the debt, which interrupts the time of the prescription.

659. As to the debtor it is immaterial whether the instrument acknowledging the debt be before a notary or under private signature: but as to third persons who have an interest that the claim should be barred, the instrument acknowledging the debt, when it is under private signature, will not be of any use to the creditor, if he has not acquired a date anterior to the accomplishment of the time of the prescription, which date must appear either by the register or by the decease of one of those who have subscribed it: for without this, deeds under private signature have no effect against third persons, but from the day when they are shewn: which has been introduced to prevent the frauds to which the facility of ante-dating might give room.

660. The verbal acknowledgment which the debtor should make of the debt, when it exceeds one hundred livres, can hardly be of any effect to the creditor, because according to the ordinance of 1667, he is not admitted to prove by witnesses things whereof the object exceeds one hundred livres, and of which he had power to procure for himself proof by writing. I think however that he would be receivable to defer to the debtor the oath, whether he has not in fact acknowledged the debt in the time and in the manner in which it is contended that he has. *Nec obstat* that the creditor after the time of the prescription is accomplished, may not defer the oath to the debtor upon the payment, as we have decided above; the difference is, that as it is avowed by the parties that the time of the prescription is accomplished, it remains established that the creditor has no longer an action, and that consequently he has no right to defer the oath. But in this instance it is not avowed by the parties that the time of the prescription is accomplished and that the creditor has no longer an action; the credi-

tor maintains to the contrary, that there has been an interruption of the time. It is true that it is for him to prove it; *nam incumbit onus probandi, ei qui dicit:* but, *inopia probationis*, he may upon this fact defer the oath. If the debt did not exceed one hundred livres, I think that the creditor might be admitted to prove by witneſſes, that the debtor has within ſuch time acknowledged the debt and promiſed to pay.

661. The payment of the arrearages which the debtor makes of an annuity, is an acknowledgment of this annuity; but as the acquittances are with the debtor, this acknowledgment is commonly of no effect to the creditor, who cannot prove it unleſs he requires from the debtor counter acquittances, or unleſs the acquittances are before a notary, and a minute of them remains.

The journal of the creditor in which he has entered the payments which may have been made to him, cannot ſerve to prove for him that he has received ſuch payments; becauſe one cannot make himſelf a witneſs for himſelf. L. 5, *Cod. de probat.*

If the annuity was due to a corporation, as to the corporation of a city, or to a company of artificers, I think that the accounts ſolemnly rendered, in which the receiver charges himſelf with the payments, ought to give faith to the payment, and conſequently to the interruption of the preſcription: for it is not likely that a receiver, if he had not actually received theſe arrearages, would have been fooliſh enough to charge himſelf with the receipt of them, and thereby oblige himſelf to pay them in the ſtead of the debtor. Beſides, whether the debtor has actually paid the arrearages of this annuity, or whether, without their having been paid, the receiver has charged himſelf with the receipt of them, as if he had received them, and had accounted for them: in both caſes the corporation to whom the annuity is due, has received the ſaid arrearages and has availed itſelf of the annuity. There can be no room then for the preſcription: it takes place only when the creditor

has not availed himself of his right and has used no diligence to do so. This is the jurisprudence of the *Chatelet d'Orleans.*

662. The second manner in which the time of the prescription is interrupted, is by judicial demand made upon the debtor. This judicial demand, when the title of the claim is with execution, is made by a command to pay served upon the debtor, or when the title is not with execution, by a writ of summons which is brought against him.

As both these acts are done by the assistance of an officer, who is an officer of justice, both contain a judicial demand.

Both acts interrupt the time of the prescription, provided they are clothed with all the formalities with which these acts ought to be clothed, in order to be valid.

If one of these acts should be null by the omission of of some formality, it would not interrupt the prescription according to the rule, *Quod nullum est, nullum producit effectum.*

An adjournment given before an incompetent judge, in the strictness of principles, does not interrupt the prescription: however when the competency might have been doubtful, the court, in pronouncing the incompetency of the judge before whom the suit was brought, sometimes sends back the parties before the judge who has cognizance of the subject, with this clause, *that they proceed before him in the same condition they were in at the time of the adjournment; Imbert*, 1, 22, 7 & 8. *Dumoulin, in styl. Parlam. p.* 7, *art.* 102, cites a decree of the 27th July, 1515, which with this clause remanded before the judge of Angers a suit which had been erroneously brought before the judge of Saumur.

There is a difference between a command and a writ of summons, that this is liable to abatement by the discontinuance of the proceedings upon the summons during the

time of three years, and when the abatement has been declared to be acquired, this writ of ſummons is regarded as nothing, and cannot have the effect to have interrupted the time of the preſcription. On the contrary the ſimple command, not forming a ſuit, is not liable to the abatement of ſuits; and even when it ſhould not be followed by any other proceedings, it preſerves its effect to interrupt the time of the preſcription, and eſtabliſh the action of the creditor during thirty years from the day of its date.

66°. When there are ſeveral debtors *in ſolidum*, the acknowledgement of one of them or the judicial demand made upon one of them, interrupts the preſcription in regard to all the others. This is what Juſtinian decides in the law *fin. Cod. de duobus reis*, as we have already ſeen *ſupra*, n. 272.

It is not the ſame in regard to ſeveral heirs of the ſame debtor. The acknowlegement which one of them makes of the debt, or the judicial demand made upon one of them, does not interrupt the time of the preſcription but for the part of which he is perſonally the debtor, and does not prevent the preſcription for the part due by the other heir, who has neither acknowleged the debt, nor has had a judicial demand made upon him: for as a debt may be extinguiſhed in part, it may alſo be preſcribed in part.

This takes place even when the debt ſhould be a debt with hypothecation, for which each of the heirs ſhould be bound with hypothecation for the whole: for as each of the heirs is perſonally bound for the debt only as to his part, although he ſhould be bound with hypothecation for the whole, the creditor by the judicial demand which has been made upon one of the heirs, has made uſe of his perſonal right of action only for the part of the debt for which the ſaid heir againſt whom a judicial demand has been made was liable, and he has made uſe of his right of hypothecation only for the part of the property fallen to this heir againſt whom a judicial demand has been made; but he has not made uſe of his right of action for the parts for which the other heirs upon whom the judicial demand has not been made were liable.

ner of his right of hypothecation upon the part of the property fallen to theſe heirs; conſequently the preſcription is acquired by theſe heirs againſt whom a judicial demand has not been made as well againſt the action which the creditor had againſt them perſonally for the parts of the debt for which they were liable, as againſt the hypothecation which he had upon the property which had fallen to them.

An objection may perhaps be made. Why, it will be aſked, does not the demand upon one of the holders of property hypothecated to my claim, interrupt the time of the preſcription againſt other holders of property hypothecated to the ſame claim, in the ſame manner as the demand made upon one of the debtors *in ſolidum* interrupts the time of the preſcription of my claim againſt the other debtors *in ſolidum?* The anſwer is, that the perſonal claim which I have againſt ſeveral debtors *in ſolidum* is a ſingle claim *in perſonam*, a claim that reſides in my perſon: therefore in making a judicial demand upon one of my debtors, I exerciſe my right for the whole and interrupt the time of the preſcription not only againſt the debtor upon whom I made the demand, but againſt all others; for as the right which I have againſt them is not a different right but preciſely the ſame which I have againſt him on whom I made the demand, in exerciſing for the whole the right which I have againſt him, I have exerciſed that which I have againſt them. On the contrary the rights of hypothecation which I have in the different eſtates hypothecated to my claim are rights *in rem*, rights which conſequently reſide in the different things in which I have the rights of hypothecation, and which are conſequently as diſtinct one from another as the things in which theſe rights reſide are diſtinguiſhed one from another. For example. When black acre and white acre are hypothecated to me for a certain claim, the right of hypothecation which I have in black acre is as different from the one that I have in white acre as black acre is different from white acre. When therefore by an hypothecary action which I bring againſt the perſon in poſſeſſion of white acre, I exerciſe the right of hypothecation which I

have in it, I do not thereby exercise the right of hypothecation which I have in black acre, and consequently this action cannot interrupt the prescription against the hypothecation which I have in black acre. According to these principles the hypothecary action which I bring against one of the heirs of my debtors, interrupts the prescription against my rights of hypothecation in the part only of the estate which this heir inherits from my debtor; but it does not interrupt the prescription against the rights of hypothecation which I have in the parts of the other heirs. When the debt is of a thing indivisible, such as a right of way, every one of the heirs being in this case a personal debtor of the whole, the interruption of the prescription with regard to one ought to interrupt it with regard to the other: *secus* when the thing due is susceptible of parts, at least intellectual parts.

The judicial demand made upon one of the debtors *in solidum* interrupts the prescription not only against the other debtors *in solidum*, but likewise against the heirs of the other debtors *in solidum*; the reason for it is the same.

Likewise a judicial demand made upon all the heirs of one of the debtors *in solidum*, interrupts the prescription against all the other debtors *in solidum*. But the judicial demand made upon one of the heirs of one of the debtors *solidum*, of a divisible debt, interrupts the prescription against the other debtors *in solidum* only for the part for which the heir was liable. *Puta*, if I had two debtors *in solidum*, one of whom left four heirs, the judicial demand made upon one of those heirs would interrupt the prescription against the other debtors *in solidum* only for the fourth of the debt for which the heir on whom the demand was made was liable; for in making a demand upon this heir, who was bound only for one fourth of the debt, I have exercised my right only for a fourth of it, consequently the prescription is acquired for the surplus to the other debtor *in solidum*, and it is acquired entirely to the co-heirs of him on whom the demand was made, as I have not exercised my right and my action for the parts for which each of them was bound.

664. It is a queſtion much controverted among writers, whether the judicial demand made upon the principal debtor, or the acknowlegement of the debt made by him, interrupts the preſcription againſt his ſecurities. Bruneman *ad L. fin. God. de duob. reis*, with the authors by him cited, and, among the moderns, Catelan, hold the affirmative. They pretend that the ſame reaſon which has led Juſtinian to decide thus in regard to co-debtors *in solidum* is found to operate in regard to ſecurities. This reaſon is, that as the claim of a creditor againſt ſeveral debtors *in solidum* is a ſingle and perſonal claim, when a judicial demand has been made upon one of them, thoſe on whom the demand has not been made, cannot ſay to this creditor that he has not exerciſed the claim which he had againſt them; ſince that which he had againſt them is the ſame as that which he has exerciſed in making the demand upon one of them. And, ſay theſe authors, the ſame reaſon operates in regard to ſecurities: the claim which the creditor has againſt them is the ſame as that which he has againſt the principal debtor, to whoſe obligation the ſecurities have only acceded: whence it follows that the creditor, in exerciſing the claim which he has againſt the principal debtor by the judicial demand which I have made upon him, has exerciſed the claim which he has againſt the ſecurities, ſince it is the ſame. They add that if Juſtinian has not ſpoken of ſecurities, it is becauſe they are as to this point, compriſed under the word *correi*, ſince they are *rei ejusdem obligationis:* they are co-debtors of the principal debtor; not indeed principal co-debtors, but codebtors acceſſory to the ſame obligation.

Duperrier and the authors by him cited, hold the negative. They ſay there is a great difference between ſecurities and co-debtors *in solidum*. When I have ſold a thing to ſeveral purchaſers who have bound themſelves to me *in solidum* for the payment of the price, the claim which I have againſt each of the co-debtors *in solidum* is a ſingle and perſonal claim, which has the ſame cauſe, and from which ariſes but one and the ſame action, which is the action

ex vendito, which I have againſt each of them; whence it follows that in exerciſing my claim by the judicial demand which I have made upon one of them, I exerciſe the claim which I have againſt all the other co-debtors upon whom I have not made the demand; becauſe it is the ſame claim which I have againſt all. It is not the ſame, ſay they, as to the principal debtor and his ſecurities. The claim which I have againſt the principal debtor, and that which I have againſt the ſecurities, are indeed claims of one and the ſame thing; therefore the payment actual or fictitious by the one, diſcharges the others. But although the claims be claims of one and the ſame thing, they are nevertheleſs claims diſtinct from one another, which ariſe from different contracts and which produce different actions. For example. When I have ſold a thing to ſome perſon for a certain ſum, for which he has given me a ſecurity, the claim which I have againſt the purchaſer and that which I have againſt the ſecurity are indeed claims of a ſingle and the ſame thing, but they are nevertheleſs claims diſtinct from one another. That which I have againſt the principal debtor, is a claim which reſults from a contract of ſale, and from which ariſes the action, *ex vendito*; that which I have againſt the ſecurity, is a claim which ariſes from the ſecuritiſhip to which he has ſubjected himſelf to me. The ſecuritiſhip is a different agreement from the contract of ſale, from which ariſes a different action, which is the action *ex ſtipulatu*. Theſe claims being diſtinct claims, when the creditor has exerciſed his claim againſt the purchaſer and principal debtor, by the judicial demand which he has made upon him, it cannot be ſaid that he has exerciſed the claim which he has againſt the ſecurity, and conſequently this demand does not interrupt the preſcription of the debt of the ſecurity. Theſe authors derive an argument from the law *fin. Cod. de duob. reis.* This law deciding that the acknowlegement of one of the debtors, or the judicial demand which has been made upon him, interrupts the preſcription againſt all the others, alledges this reaſon for it; *quum ex una ſtirpe unoque fonte unus effluxit contractus*, &c

debiti causa ex eadem actione apparuit. The ſecurities, ſay they, are not within the terms of the law; for ſecurities although debtors of the ſame thing with the principal debtor, are debtors in virtue of another contract, and the action which the creditor has againſt them is different from that which he has againſt the principal debtor.

It may be replied, that the ſecuritiſhip is a contract merely acceſſory. The ſecurities do nothing elſe than accede by this contract to the debt of the principal debtor. This contract does not form properly a new claim; it only gives the creditor new debtors who accede to the debt of the principal debtor: the claim which the creditor has againſt them is the ſame claim which he has againſt the principal debtor. As to the objection, that by the Roman law the creditor has againſt the ſecurities an action *ex ſtipulatu*, which is an action different from that which he had againſt the principal debtor, I anſwer that we need not conclude that the claim againſt the ſecurities muſt be a claim different from that againſt the principal debtor. The ſtipulation from which aroſe the action *ex ſtipulatu*, was not of itſelf a ground of the claim, it was rather a corroboration of it; it was only an act corroborative of the different agreements in which they had made it intervene; the ſtipulation by which the ſecuritiſhip was contracted, did not therefore form a new claim, it only corroborated the claim which the creditor had already, and cauſed the ſecurities to accede to it.

§. V.

How prescriptions accomplished are avoided.

665. The preſcription, although accompliſhed, is avoided, when the debtor has acknowledged the debt, notwithſtanding this be ſince the accompliſhment of the preſcription. This acknowledgment prevents him from being able to plead againſt the creditor the bar which reſulted from the accompliſhment of the time of the preſcription, and conſequently avoids and annuls it.

There is a great difference between the acknowledg-

ment which is made after the time of the prescription is accomplished, to the effect of avoiding the prescription, and that which is made before, to the effect only of interrupting it. This may be made not only by the debtor himself, but also by a tutor, a curator, a person having a general power from the debtor: it may be made by the debtor himself, although a minor, without the possibility of relief against it.

On the contrary, the acknowledgment which should be made of the debt after the time of the prescription is accomplished, to the effect of reviving the debt, cannot be made but by the debtor himself, and it is necessary that he be of age, without which he would be relievable against this acknowledgment. It cannot be made by a tutor, a curator, nor by a person having a power which was not special *ad hoc*, but only general. The reason is, that this acknowledgment, which is made after the time of the prescription is accomplished, to the effect of avoiding it, includes a gratuitous alienation of a right to the plea in bar which the debtor has acquired by the accomplishment of the time of the prescription. A gratuitous alienation of a right acquired exceeds the power of a tutor, a curator, or other person having a general power.

There results from the same principle a second difference between the acknowledgment made after the time of the prescription is accomplished, and that made before. This interrupts the time of the prescription towards and against all; whereas the acknowledgment of a debt made after the time of the prescription accomplished, does not avoid the prescription but against the debtor who has made the acknowledgment and against his heirs. It does not avoid it against the co-debtors *in solidum* of him who has made the acknowledgment, nor against his securities nor against third persons who detain the possession of what they may have acquired, before this acknowledgment, of the estates hypothecated for the debt, nor against intermediate creditors. For as the right which results from the prescription against the debt has been once acquired by the accomplishment of

the time, the debtor who has ſince acknowledged the debt, may indeed by this acknowledgment renounce the preſcription for himſelf and his heirs, but cannot renounce it to the prejudice of a right acquired by third perſons.

666. If the ſimple acknowledgment of the debt avoids and aboliſhes the preſcription, *a fortiori* ought the payment which ſhould be made of the debt after the time of the preſcription accompliſhed.

He who pays, although after the time of the preſcription accompliſhed, is therefore preſumed to pay what he owed and he cannot recall it.

Further; he who pays a part of a debt againſt which a preſcription has been acquired, is preſumed entirely to renounce this preſcription even for the ſurplus which remains to be paid. *arg.* L. 7, §. *pen. & fin.* ff. *de senatusc. Maced.*; unleſs he had proteſted, in paying, that he did not intend to acknowlege the debt but for the ſum which he paid.

According to theſe principles, it is not to be doubted that the payment which the debtor of an annuity makes of ſome arrearages ſince the time of the preſcription accompliſhed, avoids the preſcription.

667. A judgment intervening againſt the debtor alſo aboliſhes the preſcription, when it has become effectual as a thing judged, that is to ſay, when there is no farther room for appeal: the debtor after this judgment, is no longer receivable to plead the preſcription, even when he had omitted to plead it in the ſuit in which the judgment intervened; for this judgment gives the creditor a new title.

ARTICLE III.

Of the prescription of forty years.

668. According to the diſpoſitions of ſeveral cuſtoms, of the number of which is our cuſtom of Orleans, the hypothecary debtor, that is to ſay, he who has bound himſelf by an inſtrument before a notary, and his heirs, may not plead the preſcription of thirty years, but only that of forty.

Theſe diſpoſitions are conformable to the principles of

the civil law, and to the conſtitution of the emperor Juſtinian, in the law *Quum notissimi, Cod de præscr. trig. vel. quadr.* which eſtabliſhes this preſcription of forty years and it ſeems that they ought to be followed when the cuſtom is in this reſpect ſilent. This is the opinion of the commentators on the cuſtom of Paris, cited by Lemaitre.

In order to underſtand well this law, and why the hypothecary debtor has not the preſcription of thirty years as other debtors, it is neceſſary to examine the nature of the preſcription of thirty years.

This preſcription includes two kinds; the preſcription againſt perſonal claims and the preſcription againſt rights of property and other rights *in rem*. Theſe two kinds of preſcriptions ought not to be confounded: they have no reſemblance but in the time, and are very different in the manner, in which they are acquired.

The preſcription againſt perſonal claims is acquired by the debtor without any act on his part, and reſults ſolely from this that the creditor, during the time defined by the law, has not brought the action which his claim gave him, and has had no acknowlegement of it. It does not extinguiſh properly the claim, which cannot be extinguiſhed but by a payment real or fictitious; it extinguiſhes only the action which the creditor had to procure to himſelf the payment: which action before this law had no limits in its duration, and is by this law limited to thirty years. This action is extinguiſhed by this law, not *ipso jure*, but by a plea in bar which the law grants to the debtor againſt this action.

The ſecond kind of the preſcription of thirty years is that by which he who has poſſeſſed during thirty years an eſtate as belonging to him, and as free from the claims to which it was ſubject, although he does not adduce any title for his poſſeſſion, acquires the property of this eſtate, and a diſcharge from all the claims to which it was liable. While the firſt kind of preſcription is acquired by the ſole neglect of the creditor againſt whom it is made, without

any act of the debtor who makes it, this on the contrary is acquired by the fact of the poſſeſſion of the poſſeſſor who preſcribes.

The debtor who had himſelf hypothecated his eſtate, could not acquire a diſcharge from the hypothecation by this kind of preſcription, becauſe he could not be preſumed to have poſſeſſed this eſtate as free from an hypothecation which he had himſelf made. Nor could the heir of the debtor any more, according to this rule: *Hæres succedit in virtutes & vitia poſſeſſionis defuncti*; L. II, *Cod. de acq. poſſeſs.*; the poſſeſſion of the heir being preſumed to be the ſame with that of the deceaſed. Therefore although the debtor or his heirs had acquired by the firſt kind of preſcription of thirty years a plea in bar againſt the perſonal action of the creditor, they remained always ſubject to the hypothecary action of the ſame creditor; the eſtate remaining always hypothecated for the debt, which, although preſcribed and deprived of action, remained always as a natural debt, and ſerved as a ſufficient foundation for the hypothecation; L. 5, ff. *de pign. & hypoth.*

Although Anaſtaſe, by the law 4, *Cod. de preſcript. trigint.*, had introduced the preſcription of forty years againſt all the actions which were not ſubject to this of thirty, yet it was not thought that this could extend to the hypothecary action of the creditor againſt the debtor, for the reaſons which we have above deduced.

In fine, Juſtinian, as we have ſaid, extended the preſcription of forty years to the hypothecary action of the creditor againſt the debtor and the heir of the debtor; this is the diſpoſition of the law *Quum notiſſimi.*

669. If the debtor, bound perſonally and with hypothecation, had ſold the eſtate to a third perſon, this third perſon who, in the preſcription of thirty years which he would oppoſe, ſhould wiſh to comprehend the time of his predeceſſor who was perſonally bound, ought to add to the thirty years a third of the number of years yet to come of the time of the preſcription of his predeceſſor; for as his predeceſſor could not preſcribe but by a time longer by a third

yet to come than that of thirty years, he cannot, in the place of his predeceſſor preſcribe by a leſs time, according to this rule, *Qui alterius jure utitur, eodem jure uti debet.*

670. The diſpoſition of the law *Quum notissimi*, has not been adopted but in regard to hypothecations which reſult from obligations contained in inſtruments before a notary. Debtors againſt whom judgment has paſſed, preſcribe by the common time of thirty years, although the ordinance of Moulins has given the effect of hypothecations to judgments: for the law grants this hypothecation rather to the perſonal action *ex judicato*, than to the claim upon which the judgment has intervened; therefore it is extinguiſhed by the preſcription of thirty years, which extinguiſhes the perſonal action *ex judicato*.

It is the ſame with all other legal hypothecations: they are extinguiſhed when the perſonal action is extinguiſhed.

671. It is the ſame with the perſonal action *in rem* for the arrearages of feudal rents and profits, the right of redemption and other like cauſes; this action is ſubject to the common preſcription of thirty years. See the commentators on the cuſtom of Paris.

Article IV.

Of the preſcriptions of six months and of one year againſt the actions of shop-keepers, artisans and other persons.

§. I V.

In what cases the prescription of six months takes place.

672. According to the ordinance of Lewis XII, in the year 1510, *art.* 6, 8, "All drapers, apothecaries, bakers "and other kinds of tradeſmen and ſhop-keepers ſelling in "retail, are not receivable, after ſix months from the firſt "delivery, to demand the price thereof, unleſs there has "been a judicial demand, or a ſettlement of the account."

This ordinance has not been exactly obſerved.

The cuſtom of Paris has made a diſtinction: it gives, according to the ordinance of Lewis XII. the time only of ſix

months to ſhop-keepers and artiſans who deal in ſmall ſums and ſmall commodities, to demand the payment of their claims; after which time, counting from the day of the firſt delivery, it declares them not receivable. Such is the article 126 of this cuſtom, "ſhop-keepers, tradeſmen and "other perſons ſelling proviſions and commodities in retail, "as bakers, paſtry-cooks, taylors, ſadlers, butchers, har- "neſs-makers, lace-makers, farriers, keepers of cook-ſhops, "cooks and other like perſons, cannot bring their ac- "tion after ſix months paſſed from the day of the firſt de- "livery of the ſaid proviſions or commodities, ſummons or "judicial demand made, note or obligation."

In regard to ſhop-keepers and artiſans who ſell wares more conſiderable, and deal more largely, ſuch as drapers, mercers, grocers, goldſmiths, and other dealers in the groſs, maſons, carpenters, tilers; it grants them a year to bring ſuit for what is due to them, *art.* 127.

Apothecaries have alſo a year, *art.* 125.

673. The ordinance of 1673, which at the preſent day is in this reſpect the general law of the kingdom, appears to have followed the diſtinction of the cuſtom of Paris. It expreſſes in the firſt title, *art.* 7, "that ſhop-keepers by "wholeſale and retail, maſons, carpenters, tilers, lock- "ſmiths, glaziers, plumbers, pavers, and others of the like "quality, ſhall be holden to demand their payment within "a year after the delivery."

And in article 8, it expreſſes: "The action ſhall be "brought within ſix months for proviſions and commodi- "ties in retail, ſold by bakers, paſtry-cooks, butchers, cooks "and keepers of cook-ſhops, taylors, lace-makers, ſadlers, "harneſs-makers, and other like perſons." Under theſe words, "and other like perſons," are compriſed ſhoe-makers, coblers, cooks and ſellers of ſwine fleſh, &c.

674. Our cuſtom of Orleans has not admitted the pre- ſcription of ſix months except againſt the demands of letters of horſes and other beaſts; *art.* 266.

It gives expreſsly, in the article 265, one year for

demands for ſmall commodities; and notwithſtanding the ordinance of 1673, the cuſtom is always preſerved, in this bailiwick, of granting a year without diſtinction to all ſhop-keepers and artiſans, to demand payment for their wares and manufactures.

§. II.

In what cases the prescription of a year takes place.

675. The preſcription of a year takes place, I. againſt the demands of ſhop-keepers and artiſans compriſed in the article 126 of the cuſtom of Paris, and of thoſe compriſed in the article 7 of the firſt title of the ordinance of 1673. In the cuſtom of Orleans, this preſcription takes place againſt the demands of all ſhop-keepers and artiſans, without any diſtinction of large and ſmall quantities.

II. Againſt demands for bills of doctors and ſurgeons, according to the article 125 of the cuſtom of Paris, which is obſerved where the cuſtom is not explicit on that ſubject.

III. Againſt the demands of ſchool-maſters, preceptors uſhers, regents and others for the inſtruction of children. Our cuſtom of Orleans *art.* 265. has a diſpoſition to this effect, and it is a common law.

IV. Againſt demands for board and neceſſaries; *Orleans*, 265. this is alſo a common law.

V. Againſt demands for wages of ſervants labourers and others; *Orleans*, 265. This is alſo a general law.

This term *servants*, comprehends not only thoſe who ſerve about the perſon of the head of a family, but alſo thoſe who labour in huſbandry ſuch as labourers, reapers, gatherers, vineyardsmen, herdsmen, &c., thoſe who work at manufactures, ſuch as ſervants to refiners, and thoſe who ſerve as journeymen with artiſans. Under this term *servants* are not compriſed thoſe who work by the day, who have only forty days to make their demand as we ſhall *infra*.

§. III.

In what cases prescriptions do not take place.

676. These prescriptions of six months and of one year do not take place, I. when the claim is established by some instrument in writing, whether before a notary, or under private signature, or finally by an account settled which contains the articles, or the journal of a shop-keeper containing the account settled and signed by the debtor: this is the sense of the terms of the article 9, first title of the ordinance of 1673: "It is our will that the contents take "place, unless before the year and the six months there "may have been *an account settled*, a note or obligation." In this case the claim is subject only to the prescription of thirty years.

677. II. These prescriptions do not take place, if they have been interrupted by a suit brought before the time of the prescription had expired, and which had not since failed by *nonpross*; this is common to all prescriptions.

678. III. These prescriptions of a year and of six months are not observed in the consular jurisdictions, when the articles or workmanship of a shop-keeper or artisan have been delivered to another shop-keeper or artisan for his trade or art, and the parties have upon their journals accounts current with each other for the said articles. There is on this subject a celebrated case decided, of the 12 July 1672, *Journal du Palais*. The custom of Troyes, *art.* 201, has a disposition to this effect.

For example. A shoemaker to whom a currier has furnished leather, a joiner to whom a lumber dealer has furnished timber, cannot plead this prescription against the currier or the lumber dealer, who shew a journal by which it appears that they have an account current with the shoemaker or joiner.

679. IV. These prescriptions do not take place against common persons who sell small commodities and provisions, the produce of their land, as their corn, their wine,

their wood: for the ordinance as well as the cuſtom has ſubjected to the preſcription only ſhop-keepers and tradeſmen.

One ſhould in this reſpect, conſider as a common perſon and not a ſhop-keeper, a perſon who, although a ſhop-keeper by profeſſion, ſells proviſions from his land, and of which he does not make a trade; as if a grocer had ſold the wine from his vineyard.

Although a common perſon be not ſubject to the preſcription of a year, however if he had brought ſuit after a very conſiderable time, although leſs than thirty years, againſt a ſhop-keeper, to whom he had ſold proviſions of his own raiſing, and the ſhop-keeper ſhould maintain that he had paid for them, although he had no diſcharge thereſrom, it would be in the diſcretion of the judge, according to the circumſtances, to diſcharge the defendant from the demand.

§. IV.

From what time prescriptions run and against whom.

680. The preſcription againſt the demands of ſhop-keepers and artiſans, for the price of the articles and manufactures which they have furniſhed, runs from the date of each article, and the continuation of the articles makes no interruption. This was expreſſed by the ordinance of Lewis XII. which ſays from the the firſt article; by the cuſtom of Paris, which expreſſes from the day of the firſt delivery: and finally the ordinance of 1679, *art*, 9, expreſſes that the preſcription ſhall take place, though there ſhould be a further continuation of the articles.

The reaſon is, that the claim of the ſhop-keeper or artiſan who has furniſhed ſeveral articles at different times, is compoſed as well of particular claims which he has for the article that produce as many particular actions, beginning each to run from the day when the articles were furniſhed.

681. In regard to doctors and ſurgeons, I think we ought not to conſider the claim of a doctor or ſurgeon who has attended a ſick perſon during his ſickneſs, as compoſed

of as many ſeparate claims as the doctor or ſurgeon has rendered attentions, but as a ſingle and the ſame claim, which has not been completed till the attentions of the doctor or ſurgeon have been finiſhed, either by the recovery or by the death of the patient, which has put an end to his ſickneſs, or when the doctor or ſurgeon has been diſmiſſed. Therefore I think that the preſcription ought only to run from the day of the death of the patient, when the patient died in the ſickneſs, or from the day of the laſt viſit or laſt attentions when the patient has been reſtored, or when the doctor or ſurgeon has been diſmiſſed before the end of the ſickneſs.

But if the doctor or ſurgeon has attended one in different maladies, there are as many different claims and actions as there were maladies, which actions ought to be ſeparately preſcribed from the day of the termination of each malady.

682. Where the cuſtom is not explicit in regard to ſervants, there is room to think that we ought to follow the ordinance of Lewis XII., which expreſſes that they are not receiveable to demand their wages after a year from leaving the houſe of their maſters, and that during the ſaid year they may only demand the wages for the three laſt years. This is the opinion of Henry, and of Bretonnier.

The cuſtom of Paris and of Orleans having ſubjected the action of ſervants for their wages to the preſcription of a year, without diſtinguiſhing whether theſe are yet, or not, in the ſervice of their maſters, we may maintain that the preſcription againſt the action which the ſervant has for each period of his ſervice, ought to run from the day of the expiration of each period. For example, according to this opinion, if a ſervant is hired by the year, he can only demand his wages for the year before the laſt period and the price of his ſervices ſince the laſt period; and if he is hired by the month, he can only demand the wages of the laſt twelve months, and what has run ſince the laſt month.

We muſt decide the ſame in regard to the boarding of children for the purpoſe of their inſtruction.

683. Duplefsis and Lemaitre have thought that theſe preſcriptions ought not to run againſt minors. For myſelf, I think that they run as well againſt minors as againſt perſons of age; I. becauſe the contracts from which ariſe the action of ſhop-keepers and artiſans againſt whom this preſcription is eſtabliſhed, are contracts which they make in their quality of ſhop-keepers and artiſans. It is a principle that they contract as of age when they contract in this quality, and for ſomething relative to their trade or buſineſs; whence it follows that they are not relievable againſt theſe contracts. They ought then to be ſubject to the preſcription of the action which grows from theſe contracts, as perſons of age are. II. This preſcription is not eſtabliſhed as a penalty for the negligence of the creditor, which might be forgiven in a minor; but upon a ſimple preſumption of payment, reſulting from this that the payment of theſe debts is not commonly delayed ſo long: therefore this preſcription operates equally in regard to minors and perſons of age. III. As our cuſtom does not except minors from this preſcription, as it has taken care to do in regard to the preſcription of thirty years, we ought not to except them.

§. V.

Of the foundation and of the effect of these prescriptions.

684. Theſe preſcriptions are founded ſolely upon the preſumption of payment.

Hence it follows that the creditor is not ſo far not receivable as that he cannot defer to his debtor the oath, whether the ſum by him demanded is due or not. This is formally decided by the ordinance of 1673. *tit.* 1, *art.* 10. The cuſtom of Orleans has alſo a diſpoſition to this effect. *art.* 265. In this, theſe preſcriptions differ from other preſcriptions, which, being eſtabliſhed in the form of a penalty againſt the creditor, deprive him entirely of the action.

685. The debtor to whom the oath is deferred, is holden to ſwear that the ſum which is demanded from him is not

due. On his failing to swear, the oath is deferred to the person demanding, and upon his oath, he ought to obtain judgment.

686. When the widow or the heirs of him to whom the delivery has been made, are sued, they cannot be obliged to swear whether the thing be really due or not by the deceased debtor; because the oath cannot be deferred to one upon what is not his own act; *arg.* L. 42, ff. *de regul, juris.* Paul establishes a principle to this effect: *Heredi ejus cum quo contractum est, jusjurandum deferri non potest.* Paul, *sent.* 11, 1, 4. But although they cannot be obliged to swear precisely that the sum demanded is not due, the ordinance however permits the oath to be deferred whether they have not a knowledge that the sum is due; this is expressed by the article 10, above cited. On their default to make this oath it ought to be deferred to the plaintiff. The ordinance likewise permits this oath to be deferred to tutors of minors, the heirs of the deceased.

687. If the widow who was in a community of property with her husband, refused to take this oath, or even agreed that the sum is due, ought judgment to be had against the heirs who should offer on their part to affirm that they have no knowledge that it is due? To this question we must answer, no; for the debt, by the death of the deceased, being divided between the widow and the heirs, the oath which is deferred to the widow and which on her refusal is deferred to the plaintiff, relates only to the part of the debt which is due by the widow. This widow, on refusing to swear, or even in acknowledging the debt, can only oblige herself; she cannot bind the heirs: she may, by her own act, cause the prescription to cease for the part which she owed; but she cannot cause it to cease for the part due by the heirs.

It is the same thing, if one of the heirs acknowledged the debt: this acknowledgment would not oblige him, but for the part of it which he owed, and it would not oblige the other heirs, who took the oath that they had no knowledge of the debt.

688. Not only has the creditor the right to defer the oath notwithſtanding the preſcription; he may alſo, when the object does not exceed one hundred livres, be received to prove by witneſſes, that the defendant has offered to pay the ſum ſince the demand, or even before the demand, ſince the time that he has declared that he paid it. The reaſon is, that although the action which ariſes from the bargain be preſcribed, that which ariſes from the promiſe which has been made to pay, when it is in any manner proved, is a new action which is not preſcribed.

ARTICLE V.

Of several other kinds of prescriptions.

689. The demand of journeymen, for the payment of their daily wages, is preſcribed by the time of forty days. *Ordon. art.* 264.

This preſcription, as well as the preceding, is founded upon the ſole preſumption of payment; it is preſumed that theſe perſons who have need of their wages for their ſupport, do not wait a long time in procuring payment, or at leaſt in demanding it.

Therefore this preſcription does not exclude the plaintiff from deferring the oath to the defendant, as in the caſe of preſcriptions which have been before ſpoken of, nor from being received to prove that the defendant has promiſed to pay, when the price of the wages does not exceed one hundred livres.

It is aſked whether the preſcription for all the ſums runs only from the day of the laſt day's work? In ſtrictneſs it ſeems that we ought to fix the preſcription ſhould run for the price of each day's work, from the day that each is finiſhed; for as the journeyman has a right from this time to demand this day's work, his action for the price of this day's work has been from this time open, and conſequently the preſcription of it ſhould run from this time. However we may maintain that it is to run only from the day of the laſt day's work, eſpecially if the journey-

man was during this time supported by the hirer; for journeymen do not commonly demand their wages until their work is finished.

690. The demand of attorneys for their fees is prescribed by two years, counting from the day of the decease of their clients or of the revocation of their power; *Arret de reglem.* 28, *Mar.* 1692.

The second article establishes against attorneys another prescription; it expresses that they cannot in cases not determined, demand their costs, fees and charges for the proceedings had beyond six years immediately preceding, though they have always continued to act, unless they had them settled and adjusted by their clients, and this with an account of the sum to which they amount, when they exceed two thousand livres.

The law has only spoken of fees in cases not determined; in regard to those terminated by a final judgment, the prescription of two years ought to run from the day that the power of the attorney expired by the final judgment: as in cases not determined, it runs from the day it has ceased by the revocation, or by the decease of the party.

691. There is no law which limits the time of the action for fees of notaries and officers. It would be equitable to extend to these officers the prescription of six years established in regard to attorneys; but, this not being fixed by law, we should have great regard to circumstances.

There is another kind of prescription against attorneys and officers which results from the return which they have made of the papers of the suit to the parties: there results from this return a presumption of payment and it is commonly said at the bar, *papers returned, papers paid.*

Attorneys being obliged by the rules of the court, to have a journal upon which they are to enter the payments which are made to them by their clients, there results from the want of shewing this journal a plea in bar against the demand which they make for their fees. *Reg. de Cour,* 2, Aug. 1692.

692. The demand of a client for the reſtitution of the papers, with which an advocate or attorney has charged himſelf, is preſcribed by five years from the day of the date of the final judgment or from the compromiſe; and by ten years, when the proceedings have not been terminated.

This preſcription is of the ſame nature as the preceding, and is founded upon the preſumption of the reſtitution of the papers after this lapſe of time; therefore it does not exclude the deciſory oath.

It is the ſame thing with that which operates in favor of counſellors of the court, their widows and heirs; they are diſcharged from their liability to account for papers of the ſuit, by the lapſe of three years from the day of the judgment, when the ſuit has been determined, or from the day of the deceaſe of the counſellor, or from his reſignation, although the ſuit has not been determined.

We have no law in regard to inferior judges; but we cannot refuſe to them the preſcription of five years granted to advocates and attorneys.

693. All theſe preſcriptions have for their ſole foundation the preſumption of payment, and they do not prevent the plaintiff from deferring the oath to the defendant, whether it be true, that he has paid, or that he does not retain the papers which are demanded from him.

There are other kinds of preſcriptions againſt different kinds of actions, as that of ten years againſt all reſciſſory actions, that of five years for arrearages of annuities, that of a year againſt demands for redemption; that againſt actions *redhibitoriæ*, on account of a defect in the thing ſold to take back or reſtore, of which the time is differently ruled by the cuſtom and different uſages of places. We ſhall ſpeak of theſe preſcriptions when we treat of the ſubjects to which they relate.

FOURTH PART.

Of the proof as well of obligations as of the payment of them.

694. HE who claims to be the creditor of any one is obliged to prove the act or agreement which has produced his claim, when it is conteſted: on the contrary when the obligation is proved, the debtor who claims to have diſcharged it, is obliged to prove the payment. There are two kinds of proofs, literal and teſtimonial, of which we will treat ſeparately in the two firſt chapters. Confeſſion and certain preſumptions hold alſo the place of proofs, as alſo the oath: we ſhall treat of them in a third chapter.

CHAPTER THE FIRST.

Of literal proof.

695. Literal proof is that which reſults from inſtruments or writings. For example. The literal proof of the obligations which ariſe from agreements, as from a contract of ſale or of hire, is that which reſults from the inſtruments or writings which include theſe agreements. The literal evidence of the obligation which a judgment produces, is the record which contains that judgment. The literal evidence of the payment of any obligation whatever, is the receipt which the creditor has given thereof.

Theſe inſtruments are either authentic or private. We call authentic inſtruments, thoſe which are taken by a public officer, as a notary or clerk of a court. Private inſtruments are thoſe which are taken without the aid of a public officer.

Theſe inſtruments are alſo original, or copies: we alſo diſtinguiſh titles primitive and recognitive. We will treat in a ſummary manner of theſe different inſtruments.

ARTICLE THE FIRST.

Of authentic original titles.

§. I.

What instruments are authentic.

696. Authentic inſtruments are thoſe which are taken by a public officer, with the requiſite ſolemnities.

It is neceſſary that the inſtrument ſhould be taken in the place where the officer has a character of public officer, and a right to act as ſuch. Therefore if a notary takes an inſtrument out of the diſtrict where he is notary, this would not be an authentic inſtrument.

By a particular practice of the courts of Paris, of Orleans and of Montpellier, notaries of theſe courts have the right to take inſtruments all over the kingdom. *Orleans, art.* 463.

697. Although there are ſome regulations which have denied to ſubaltern notaries to take inſtruments between other perſons than thoſe who are within the diſtrict in which they are eſtabliſhed, and for other property than that which is ſituated within their diſtrict, yet ſuch inſtruments are not the leſs authentic, theſe rules having been conſidered as fiſcal laws, and not having had effect.

698. If the notary or public officer was interdicted his office, when he took the inſtrument, the inſtrument would not be authentic.

It is neceſſary alſo for the authenticity of the inſtrument, that the formalities required ſhould have been obſerved; that the notary ſhould be himſelf accompanied by another notary or two witneſſes, that the inſtrument ſhould be upon ſtamped paper, that it ſhould be regiſtered.

699. When the inſtrument is not authentic, either by the incompetency, or the interdiction of the officer, or for want of form; if it is ſigned by the parties, it has at leaſt the ſame evidence againſt the party who has ſigned it, as an inſtrument under private ſignature. *Boiceau* 4, *part.* 2 *ch.* 4.

§. II.

How authentic instruments are evidence against the parties.

700. An authentic original inſtrument is full evidence of itſelf of what is contained in the inſtrument.

Neverthelefs, when this inſtrument is produced without the diſtrict of the public officer who has taken it, it is common to eſtabliſh the ſignature of this officer, by a note or certificate at foot.

This certificate is an atteſtation given by the judge of the place, by which this judge certifies that the officer who has taken and ſigned the inſtrument, is truly a public officer, notary, &c.

The ſignature of the public officer who has taken the inſtrument gives full faith to whatever it includes, and to the ſignatures of the parties who have ſubſcribed it, ſo that it is not neceſſary conſequently to prove it otherwiſe.

Neverthelefs, authentic inſtruments may be ſtated to have been forged; but until the plea of forgery has been ſo adjudged, they are proof by proviſo, and the judge ſhould ordain the proviſional execution of what they include. This is decided by the law 2, *Cod. ad l. Corn. de fals.* This deciſion is a very wiſe one. Crime is not to be preſumed, and it would be very dangerous that debtors ſhould have power to ſtop during a long time the payment of lawful debts by a charge of forgery. It is in conſequence of this principle that Dumoulin in *Cons. Par.* §. 1, *gl.* 4, *n.* 41, decides that homage made by the vaſſal, although the record ſhould be pleaded by the lord, to have been forged ſhould procure a proviſional replevy from feudal ſeizure.

§. III.

Of what things authentic inſtruments are evidence against the parties.

701. Authentic inſtruments are evidence principally againſt perſons who were parties, their heirs and thoſe who are in their rights. They are full evidence againſt theſe perſons as to every diſpoſition of the inſtrument, that is to

say, of what the parties have had in view, and which was the object of the instrument.

702. They are full evidence as to whatever has been expressed by way of recital, when the recitals have a reference to the disposition. *Molin. in Cons. Par.* §. 8, *gl.* 1, *n.* 10. For example. If one by an instrument make acknowlegement of a rent due in these terms, "*he acknowleges that such a house by him possessed is charged towards Robert, now present, for so much yearly rent, of which the arrearages have been paid to this day, and he has therefore obliged himself to continue it to him;* these terms, *of which the arrearages have been paid,* although they be only by way of recital, and it be not expressed that Robert acknowleged to have received them, are however evidence as to the payment against Robert, a party to the instrument: because they have reference to the disposition of the instrument, and it ought to have been mentioned in the instrument how much was really due of the arrearages of this rent.

703. In regard to recitals in the instrument, which are entirely foreign to the disposition, they may indeed have the nature of half-proof; but they are not entire proof, even against the persons who have been parties to the instrument; *Molin, ibid.* For example. If in the contract of sale of a piece of land which Peter has made to me, it is recited that this piece of land comes to him from the estate of James; a third person, who as heir on the part of James should demand from me the restoration of his portion of this estate, could not, in order to ground his demand, prove by this single recital in my contract, that this piece of land was really of the estate of James, although I was a party to the instrument, in which this recital is; because it is entirely foreign to the disposition of the instrument, and I had not then any interest in opposing this recital.

§. IV.

Of what things instruments are evidence against third persons.

704. The instrument proves against a third person rem

ipsam, that is to say, that the agreement which it includes has intervened. *Molin, ibid. n.* 8.

For example, the inſtrument which includes the contract of ſale of an eſtate proves even againſt a third perſon, that there has really been a ſale of this eſtate contracted at the time expreſſed in the inſtrument.

Therefore if the lord of a manor has made an agreement with his ſteward, who has bound himſelf to account for all the feudal profits which ſhould ariſe during a certain time in his manor; the inſtrument containing the contract of ſale of an eſtate ſituated in the manor, is evidence againſt the ſteward, although he has not been party to the inſtrument, that there has been a ſale of this eſtate; *probat rem ipsam*, and conſequently the lord may demand from the ſteward an account of the profits, to which this ſale has given riſe, which the ſteward ought to have collected.

But the inſtrument is not evidence againſt a third perſon, who has not been a party to the inſtrument, of what is there recited. *Molin. ibid. n.* 10.

For example. If it is recited in the contract of ſale that the houſe of the ſeller has a right of view over the houſe adjoining, this recital will make no proof againſt the proprietor of the adjoining houſe, who is a third perſon, not a party to the inſtrument.

705. This rule undergoes an exception; for *in antiquis enunciativa probant*, even againſt third perſons, when theſe recitals are confirmed by long poſſeſſion. *Cravett. de antiq. temp. p.* 1, *cap.* 4, *n.* 20. For example. Although long uſage does not eſtabliſh a right of way or of view, &c. yet if my houſe has had for a long time paſt a view over the houſe adjoining, and in the old contracts of purchaſe by thoſe from whom I hold, it is recited that it has this right of view, theſe old contracts, confirmed by my poſſeſſion, will be evidence of my right of view againſt the proprietor of the neighbouring houſe, although he be a third perſon and his predeceſſors have never been parties to the contracts.

Likewiſe in our cuſtoms which do not admit of any

when the defendant has not yet conteſted the truth of the ſignature, the paper under private ſignature is evidence, and the plaintiff may without being obliged to procure the acknowlegement of it, obtain in virtue of this paper a judgment. *Declaration of the 15th May 1703.*

710. There is alſo ſomething particular in regard to the notes and promiſes by which a perſon obliges himſelf to pay a ſum for the loan of money or other thing; to wit, that when the promiſe is written in another hand than that of the perſon who has ſubſcribed it, it is neceſſary, in order that it may be evidence againſt the perſon who has ſubſcribed it, that this perſon ſhould have written, beſides his ſignature, with his own hand the ſum which he is obliged to pay, which is uſually done in theſe terms, *good for ſuch a ſum.* This has been ordained by the declaration of the king, 22d September, 1733, to avoid the ſurpriſe by which ſome perſons are taken, who ſign inſtruments at which they are preſent, without having read their contents.

But as commerce would be reſtrained, if all ſorts of perſons were bound to this formality of writing in their own hand the ſum which they oblige themſelves to pay, there being a great number of perſons who know only how to ſign their name, the law excepts from its diſpoſition, traders, artiſans, labourers and people of the country, againſt whom promiſes ſubſcribed by them are evidence, although they contain only their ſignature.

711. When the ſum written in the hand of the debtor out of the body of the note or promiſe, is leſs than the ſum expreſſed in the body of the note, written in another hand, for example, if in the note it is ſaid, *I acknowledge to owe to ſuch a perſon the ſum of three hundred livres*, and at the foot and out of the body of the promiſe it is written, in the hand of the debtor, *good for two hundred livres*, it is not to be doubted that the promiſe ſhould be evidence only for the two hundred livres.

If the body of the note was written entirely in the hand of the debtor, as well as the words *good, &c.*; in the

doubt whether the ſum expreſſed in the body of the inſtrument, or that expreſſed at the foot, *good*, &c. is the ſum truly due, we ought, *cæteris paribus*, to decide in favor of the liberation, according to this rule, *Semper in obſcuris quod minimum eſt ſequimur*; L. 9, ff. *de R. J.* Therefore, in the inſtance propoſed, the promiſe would be good only for two hundred livres. But if the cauſe of the debt expreſſed in the body of the note makes it known that the ſum expreſſed in the body of the note is that which is truly due, we muſt decide otherwiſe. For example. If the promiſe written in the hand of the debtor expreſſes, *I acknowledge that I owe to A. B. the ſum of three hundred livres, for fifteen yards of cloth of Pagnon which he has ſold me*, and it appears that this kind of cloth was worth twenty livres a yard, the promiſe would be good for three hundred livres, although it be ſaid *good for two hundred livres.*

712. The ſame rules of deciſion are to be followed in the inverſe caſe.

When the ſum expreſſed in the body of the note is leſs than that expreſſed at foot, *good*, &c. as when it is ſaid I acknowledge that I owe to A. B. two hundred livres, and at foot, *good for three hundred livres; cæteris paribus*, the preſumption is for the ſum of two hundred livres, unleſs the expreſſion of the cauſe of the debt manifeſts that it is that of three hundred livres which is really due.

713. If a perſon is and acknowledges himſelf debtor and depoſitary of a certain ſum according to a minute of the money annexed to the inſtrument, it is the ſum to which the money expreſſed in the minute amounts, which is the ſum due, although that expreſſed in the inſtrument be different: it is in this caſe an error of calculation.

714. Inſtruments under private ſignature are not evidence againſt the perſon who has ſubſcribed them, when they are found in his poſſeſſion.

For example. If there be found among my papers a note ſubſcribed by me, by which I acknowledge to owe you one thouſand livres which you have lent me, this

note will be no evidence of the debt; for, it being in my poſſeſſion, the preſumption is either that I had written this note with a hope that you would lend me the money, and that, as the loan did not take place, the note has remained with me, or that, if the loan did tak eplace, I have repaid the money, and have taken up the note.

It is the ſame with regard to inſtruments of diſcharge, though more to be favored. For example. if there has been found among the papers of my creditor a receipt ſigned by him of a ſum which I owed him, it would not be evidence of the payment; for the receipt being in his poſſeſſion it will thence be concluded that he had written it beforehand, in hopes that I would pay him, and this not happening, the receipt has remained with him.

715. Inſtruments under private ſignature as well as thoſe which are authentic, are not evidence againſt third perſons, except that the thing contained in the inſtrument has really taken place; *probant rem ipsam:* but they have this inferiority to authentic inſtruments, that theſe having an eſtabliſhed date, by the teſtimony of the public officer who has received the inſtrument, are evidence againſt third perſons that the thing contained in the inſtrument took place at the time expreſſed by the inſtrument; whereas thoſe under private ſignature being ſubject to be antedated, are not commonly evidence againſt third perſons, that the thing which they contain took place, except from the day when they are alledged and produced to third perſons.

Therefore, if I have ſeized the eſtate of my debtor, and the tenant who is in poſſeſſion of the eſtate oppoſes the ſeizure, and pretends that the eſtate belongs to him; if, to prove it, he produces an inſtrument under private ſignature, by which it is ſaid that my debtor has ſold to him this eſtate, and this inſtrument has an anterior date, not only to my actual ſeizure but even to my claim, he will not thereby obtain the replevy which he demands: for this inſtrument, being under private ſignature, does not prove againſt me, a third perſon, that the ſale which it mentions

was made at the day expreſſed by the inſtrument; this inſtrument has no date but from the day when it is produced againſt me; and as it is not preſented to me till after the actual ſeizure, it does not prove that the eſtate has been ſold to him, except ſince the actual ſeizure, a time when it was not in the power of the debtor to ſell to the prejudice of my ſeizure.

If however the inſtrument under private ſignature had an eſtabliſhed date, *puta*, by the deceaſe of one of the parties who had ſubſcribed it, it would be evidence even againſt third perſons that the thing contained in the inſtrument had already taken place, at leaſt at the time of the death of the party who ſubſcribed it.

§. II.

Of private writings, derived from the public archives.

716. We call public archives a depoſit of titles eſtabliſhed by public authority. *Archivum*, ſays Dumoulin, *est quod publice autoritate potestatem habentis erigitur.*

Theſe depoſits, being eſtabliſhed only to preſerve true titles, they aſſure the truth of thoſe which are derived therefrom. Therefore inſtruments under private ſignature, taken from the public archives, with the atteſtation of the keeper of the archives that they have been taken therefrom, are evidence, although they have not been otherwiſe proved. *Molin. in Cons. Par.* §. 8, *gl.* 1, *n.* 26.

§. III.

Of the archives and rentals of manors.

717. One cannot make titles for himſelf: therefore, inſtruments which are not taken by a public perſon, ſuch as the rentals or regiſters which the lord of a manor himſelf keeps of the rents and duties which are annually paid to him, cannot be evidence of the payment of theſe rents, nor conſequently a ſufficient ground for the demand which the lord would make to have them recogniſed.

Nevertheleſs, when theſe rentals are antient and uniform, they form a half-proof, which joined with other

proof, such as would be that which results from the recognition of the proprietors of the adjoining lands, would sufficiently establish the demand of the lord.

718. These rentals and other manorial papers which are not authentic, are not evidence for the lord against others; but they are proof for others against him. Therefore if the lord has usurped from me the possession of an estate, I may establish my demand against him for its restoration, by his archives and rentals from which it would appear that he had received the rents for this estate from me and my father, to whom I should contend that he had granted them.

But when the tenant has made use of the lord's rentals against him, he may in his turn make use of them against the tenant; and in this case they are full proof in his favor. *Molin. ibid. n.* 20. For example, if in the instance above proposed, the tenant has made use of the rentals of the lord to prove that an estate of which the lord has usurped from him the possession, belonged to him, as having been granted to him by this lord, the lord, on his part, could in his turn make use of the same papers to prove that this estate is charged with all the incumbrances mentioned therein; and the said rentals would in this case in regard to this particular be full proof in favor of the lord.

Nevertheless, they could only prove, even in this case in favor of the lord, facts which have relation to those for which they are made use of against him. For example, the lord could not prove by these papers that another piece of land which I possess is holden also from him.

§. IV.

Of the books of merchants.

719. No one being able to make a title for himself, according to the principle which we have already established, it follows thence that the journals of merchants, upon which they enter, day by day, the merchandises which they sell to different persons, cannot be full and entire

proof of theſe articles, againſt the perſons to whom they have been delivered.

Nevertheleſs, in favor of trade it is eſtabliſhed, that when theſe books are well kept, written from day to day without any blank, the merchant having a reputation of probity and his demand being made within a year after the delivery, they are half-proof; and very often the judge may, upon the demand of merchants for the payment of the ſaid articles, receive their oath as to the truth of the delivery, in order to ſupply what is wanting in the proof which reſults from their books.

This is the opinion of Dumoulin, *ad* L. 3, *Cod. de reb. cred. vol.* 3, *p.* 635, *col. of the edition of* 1681, where in ſpeaking of the books of merchants having a reputation of probity, he ſays: *Rationes ejus, quamvis non plenam probationem, nec omnino semiplenam inducant, tamen inserunt aliquam præsumptionem ex qua possit ei deferri juramentum, ita ut per se rationes probent.*

This ought eſpecially to take place between merchant and merchant.

720. Boiceau, *part.* 2, *ch.* 8, requires that what reſults from the books of a merchant ſhould be confirmed by other evidence, as, for example, that the defendant was accuſtomed to ſupply himſelf at the ſtore of the merchant and to buy of him on credit. Such a fact or ſome other ſimilar, being acknowledged, or, in caſe of its being denied, proved by witneſſes, according to the deciſion of this author. the oath of the merchant, reſpecting the delivery of the articles charged in his books, ought to be received as evidence.

721. We may further add that in order to defer the oath to a merchant againſt a common perſon upon the truth of the charges in his book, it is neceſſary that they ſhould not amount to a ſum too conſiderable, and that it ſhould be entirely probable that the defendant had need of them.

For example. The delivery of the articles would not be

very probable, if it were charged upon the book of a merchant, that he had sold and delivered to me ten yards of black cloth within a year; because I have not need of more than one suit in the year, for which four yards would be sufficient.

722. In regard to such shop-keepers as are not of the body or company of merchants, but people of the lower class, Boiceau, *ibidem*, thinks that their books ought not to be evidence.

723. After having seen what proof the books of merchants are in their favor, it remains for us to see what proof they are against them. It is not to be doubted that they are complete proof against them, either of the bargains which they have made, or of the delivery which has been made, or of the sums which have been paid, to them.

This takes place even when the thing has been written by another hand than that of the merchant, provided it be established that the journal is that which the merchant has been accustomed to make use of; for this journal being in his possession, the presumption is that whatever is there written has been written with his consent. *Dumoulin, ad* L. 3, *Cod. de reb. cred.*

Dumoulin, *ibid.*, alledges as the first limitation of this rule, that in order that the journal of a merchant may be evidence against him of the sum which he has acknowledged to owe to any one, it is necessary commonly that the cause of the debt should be there expressed; for as there cannot be a debt without a cause which has produced it, and the writing alone does not make the debt, the demand of the debt cannot be well grounded, while there does not appear any cause.

But it is sufficient that one should appear, even by presumption and conjecture. Therefore if a merchant has written upon his book that he owed a certain sum to a certain merchant, although he has not expressed the cause,

his book would be evidence againſt him in favor of this merchant; if this merchant is the ſame who has been accuſtomed to furniſh him with merchandiſes of his own trade: for in this caſe the preſumption is, that the cauſe of the debt is the delivery of theſe merchandiſes. *Dumoulin, ibid.*

The ſecond limitation which Dumoulin alledges is, that faith ſhould be given to the journal alone, and not to the looſe papers which might be found in the journal.

The third limitation which he alledges is, that the journal of a merchant is no evidence againſt him in my favor, if, willing to avail myſelf of it againſt him, I will not allow it againſt myſelf; for one ought not to take advantage of a paper which he himſelf rejects. *Molin. ibid. Nam fides scripturæ est indivisibilis. Doct. ad* L. *Si ex fals.*, 42, *Cod. de trans.*

§. V.

Of the private papers of individuals.

724. After having treated of the journals of merchants, it is in order to ſpeak of thoſe of private perſons, who are not merchants.

It is not to be doubted that what we write upon our private papers cannot be evidence in our favor againſt any one who has not ſubſcribed them. *Exemplo perniciosum est, ut ei scripturæ credatur, qua unusquisque sibi adnotatione propria, debitorem constituit*; L. 7, *Cod. de probat.* But are they evidence againſt us? Boiceau, *part.* 2, *ch.* 8, *n.* 14, diſtinguiſhes the caſes in which what we have written ſhould go to bind us towards one, or to diſcharge our debtor.

In the firſt caſe, for example, if I have written upon my journal, or my memorandum-book that I have borrowed twenty piſtoles of Peter. Boiceau, *ibid.*, thinks that if this acknowlegement made upon my journal or memorandum-book is ſigned by me, it is complete evidence of the debt againſt me and my heirs; and that if it is not ſigned, it is only half-proof, which ought to be confirmed by ſome other evidence.

I find this diſtinction of Boiceau plauſible, but for another reaſon than that he has alledged. When the entry which I have made upon my journal of the money borrowed is not ſigned, this entry appears only to have been made in order to preſerve an account for myſelf, and not to ſerve the creditor for proof of the loan which he has made to me: this creditor having no note, the preſumption is that he has rendered it up to me when I paid him, and that, finding myſelf ſafe by the return which he has been made me of my note, I have neglected to eraſe the entry and to make mention of the payment which I have made. But when I have ſigned this entry, my ſignature indicates that I have made it with an intention that it ſhould ſerve the creditor for proof of his claim, it ought then to ſerve him for that purpoſe.

Although I have not ſigned the entry or memorandum, if I have otherwiſe declared or made known, that I made it in order that it might ſerve for proof of the loan, in caſe I ſhould be ſurpriſed by death, as when I declared by this memorandum that he who had made me the loan was not willing to receive a note from me, the memorandum in that caſe, though not ſigned, ought to be evidence of the debt againſt me and my heirs.

When the entry, although ſigned, is eraſed, it is no longer any evidence in favor of the creditor; on the contrary the eraſure is a proof that I have returned the ſum, if the creditor has not beſides ſome other evidence.

We paſs to the ſecond caſe, which is that in which what I have written upon my journal does not go to oblige me but on the contrary to diſcharge my debtor; as when I have written upon my journal the payments which he has made me. It is not to be doubted in this caſe that what I have written upon my journal, whether I have ſigned it or not, is full evidence againſt me in favor of my debtor; for the diſcharge is to be favored.

§. VI.

Of writings of private persons not signed.

795. There are three kinds of these writings; I. journals and memorandum-books; II. writings on loose papers, and which are not at the foot, in the margin or on the back of a signed instrument; III. those which are at the foot, in the margin, or on the back of a signed instrument.

We have spoken of the first kind in the preceding paragraph.

Those of the second kind tend either to oblige, or to discharge; in regard to those which go to discharge, such as receipts written in the hand of the creditor not signed, which are found with the debtor; although we have decided in the preceding paragraph that the receipts written upon the journal of the creditor are full evidense of the payment, without its being necessary that they should be signed, I do not think that we must also decide that receipts not signed, upon loose papers, although written entirely in the hand of the creditor and in the possession of the debtor, should likewise be full evidence of the payment. The reason of this difference is, that it is not common to sign receipts which are written upon a journal, whereas it is common for a creditor to sign the receipts which he gives to his debtor. Therefore when the receipt is not signed, we may believe that it has been given to the debtor before the payment, *puta*, for a simple form, that the debtor might examine whether he would approve of the manner in which it has been expressed, and the creditor has delayed to sign it until he should be paid. Yet if this discharge is dated, so that nothing is wanting but the signature; if it is quite a simple receipt and of which it was not necessary to make a form; lastly if no reason appear for which this receipt could come to the debtor before the payment; in this case I think we must presume that it was merely forgotten that the receipt was not signed, and that it should be evidence of payment, especially if the supplementary oath of the debtor be added thereto.

In regard to writings not ſigned, upon looſe papers, which tend to oblige the perſon who has written them, ſuch as a promiſſory note, an inſtrument of ſale, &c.; although they are found in the hands of him towards whom the obligation was to be contracted, they are no evidence, however againſt the perſon who has written them, that the obligation has really been contracted, and they paſs only for ſimple projects which have not been executed.

726. It remains for us to ſpeak of writings not ſigned which are at the foot, in the margin or on the back of a ſigned inſtrument. Theſe writings tend either to a diſcharge or to a new obligation.

In regard to thoſe which tend to a diſcharge, it is neceſſary alſo to diſtinguiſh the caſe in which the inſtrument at the foot or on the back of which they are, is and has never ceaſed to be in the poſſeſſion of the creditor, from that in which it ſhould be in the poſſeſſion of the debtor. In the firſt caſe, as when at the foot or on the back of a promiſſory note ſigned by the debtor, and which is in the poſſeſſion of the creditor, there are found receipts of ſums received on account; theſe receipts, although neither ſigned nor dated, are full proof of payment not only when they are written in the hand of the creditor, but alſo in any other, even in that of the debtor; becauſe it is more than probable that the creditor would not have left theſe receipts written upon the note which he had in his poſſeſſion, if the payments had not been actually made to him.

Further: although the writings not ſigned which are at the foot or on the back of an inſtrument in the poſſeſſion of the creditor, and which tend to the diſcharge of what is expreſſed by the inſtrument, ſhould be cancelled, they would not ceaſe to be evidence; for it ought not to be in the power of the creditor in whoſe poſſeſſion the inſtrument is, much leſs ought it to be in that of his heirs, to deſtroy, by cancelling this writing, the proof of the payment which it contains.

727. Theſe diſpoſitions apply when the inſtrument is

in the hands of the creditor: *quid*, if the inſtrument is in the hands of the debtor, *puta* if at the foot, on the back or in the margin of a bill of ſale made double, which is in the hands of the purchaſer, debtor of the price, receipts are found not ſigned? Theſe writings will be full evidence, if they be in the hand-writing of the creditor; theſe receipts, being on the inſtrument itſelf that contains the obligation, are better evidence than receipts, not ſigned, written on a looſe ſheet. It is the ſame with regard to receipts, not ſigned, written in the hand of the creditor that might be at the foot of a preceding receipt ſigned: but if theſe writings are in another hand than that of the creditor, not being ſigned by him, they are not evidence; for it ought not to be in the power of the debtor to procure his diſcharge from the debt, by cauſing receipts to be written on the inſtrument which is in his poſſeſſion, by any perſon he pleaſes.

Receipts, though in the hand writing of the creditor, upon the inſtrument that is in the poſſeſſion of the debtor, are no evidence if cancelled; for it is obvious that the debtor in whoſe poſſeſſion the inſtrument is, would not have cancelled them if the payment had really been made. And there is room to believe that the creditor had written the receipt on overtures of payment being made and that he afterwards cancelled it, theſe overtures not having been carried into effect.

728. As to writings, not ſigned, that tend to oblige, when they expreſs a relation to the ſigned inſtrument at the foot, on the back or in the margin of which they may be, they are evidence againſt the debtor who wrote them. For example. If under a promiſſory note ſigned by Peter, by which he acknowleges that James has lent him one thouſand livres, there ſhould be written in the hand-writing of Peter, *further, I acknowledge that the said James has lent me two hundred livres more*, this writing although not ſigned will be evidence againſt Peter; becauſe by theſe words *further, more*, it has a relation to the writing ſigned by him. *Boiceau*, 11, 2; & *Danty*, *ibid.*

Likewiſe, if at the foot of a bill of ſale of a farm, ſubſcribed by both parties, there is a poſtſcript in the hand of the ſeller, though not ſigned, ſtating that the cattle on the farm are included in the ſale, this poſtſcript will be evidence againſt the ſeller.

If it were written in another hand, it is obvious it would not be evidence againſt him, if the inſtrument were produced by the purchaſer; but if the poſtſcript were at foot of the inſtrument which is in the hand of the ſeller, this poſtſcript, although in another hand, would be evidence againſt the ſeller; for he would not have ſuffered this poſtſcript to be written at the foot of the inſtrument, which was in his poſſeſſion, if the contents of it had not been agreed upon by the parties.

729. When the writings not ſigned, being at the foot, on the back or in the margin of an inſtrument, have no relation to this inſtrument, they are as if they had been written on a looſe ſheet. See what has been ſaid *supra*, *n.* 725.

§. VII.

Of tallies.

730. We call *a tally* the two parts of a piece of wood cleft in two, which two perſons make uſe of to mark the quantities of things daily delivered by one to the other.

For this purpoſe each of them has one of theſe pieces of wood. The one which the perſon who makes the delivery, retains is properly called the *tally*; the other is called the *standard*.

When the delivery is made, the two pieces are joined together and a mark, denoting the quantity of the things delivered, is made on them with a knife. Such are the tallies of bakers.

Theſe tallies ſtand in the place of writings, and are a kind of literal evidence of the quantity of the things delivered, when he to whom they were furniſhed produces the ſtandard to join it with the tally.

ARTICLE III.

Of copies.

731. It is a rule common to all copies, that when the original exists they are not evidence, except of what is in the original, as notaries ought not, even under pretext of interpretation, to add, in the instruments they copy and engross, any thing to what is contained in the original.

Therefore there can hardly be a question upon the faith which is due to copies, when the original exists; for if one should be in doubt respecting their contents, recourse may be had to the original.

There may be more difficulty, when the original is lost, to know what credit should be given in this case to copies. It is necessary first to distinguish those which have been made by a public person, and those which have not been made by a public person. It is necessary further in regard to the first, to distinguish three kinds; I. those which have been made by the authority of the judge, the party being present or having been duly cited; II. those which have been made without the authority of the judge, but in presence of the parties: III. those which have been made not in the presence of the parties, and without their having been cited by the authority of the judge. We will treat of these three kinds in the three first paragraphs. The register of entries includes copies of the class of those which are made by a public officer. We shall treat of these in a fourth paragraph. We shall treat in a fifth of copies which have not been made by a public person; in the sixth, of the copies of copies.

§ I.

Of copies made by the authority of the judge, the party being present or having been duly cited.

732. He who would have a copy of this kind which may serve instead of the original, presents a petition to the judge, at the foot of which the judge orders that a copy be taken from the original of such instrument, at a certain place,

day and hour, and that the parties interested be cited to attend. In consequence of this order, which is signified to the parties, they are caused, by the same instrument, to be cited to attend at the place, day and hour appointed.

The copy which in consequence hereof is made from the original by a public officer whether in the presence of the parties or in their absence after they have been, as we have already said, cited to attend, is a copy which we call a copy in form. When the original is afterwards lost, it has the same faith against the parties who were there present or had been cited to attend, and against their heirs or successors, as the original itself would have had. *Merl. in Cons. Par.* §. 8, *gl.* 1, *n.* 37.

733. Observe that when these copies are still recent, the recital which is there made of the order of the judge, and the citations given to the parties to be at the place, day and hour, at which the copy was to be taken, is not sufficient proof that these formalities have been observed. Therefore, in order that, in want of the original, the copy should be as entire evidence as the original would have been, it is necessary that he who makes use of it, should shew the order of the judge and the citations.

But when these copies are antient, this recital of the formalities observed, is a sufficient proof that they were observed, according to this rule, *Enunciativa in antiquis probant*; and it is not necessary to shew either the order of the judge or the citations.

In order that a copy may be reputed antient, with the effect to dispense with shewing the proceedings which are there recited, it is not necessary that it should have an antiquity of thirty or forty years; such as that which is requisite to supply what is wanting in instruments, to make them full evidence, and of which we shall speak *infra*, *n.* 757: it is sufficient that it have an antiquity of ten years. On this principle it is holden that after ten years the highest bidder, under a judgment which is attacked, is not oblig-

ed to ſhew the proceedings on which the judgment has intervened.

734. Theſe copies in form, which, in regard to perſons who were preſent or had been duly cited, have the ſame faith as the original, have in regard to other perſons who neither were preſent nor had been cited, only the effect which thoſe would have had without the party being preſent or having been cited, of which we will ſpeak *infra*, §. 3. *Molin. ibid. d. n.* 37.

§. II.

Of copies taken in the preſence of the parties, but without the authority of the judge.

735. Theſe copies are not properly *copies in form*; ſince they are not made by the authority of the judge: yet they have the ſame effect between the parties who have been preſent, their heirs or ſucceſſors, as copies in form, and they are between theſe parties, like copies in form, for want of the original, the ſame evidence which the original would be. They derive this authority from the agreement of the parties; for the parties by their preſence when the copies were taken have impliedly agreed that they ſhould, between themſelves, hold the place of the original. Theſe copies are not however always the ſame evidence as copies in form; for as they derive their force ſolely from the agreement of the parties, it follows thence that they cannot have the ſame force in regard to things of which it is not in the power of the parties to agree, and of which the parties have not the diſpoſal.

Therefore if, without the authority of the judge, I have taken a copy, with the incumbent of a benefice, of a long leaſe, viz, from nine to a hundred years, of an eſtate depending on this benefice, and of other papers containing the formalities which ought to have accompanied it, and the ſucceſſor demands from me this eſtate; the copies which I have taken in the preſence of his predeceſſor, would not be againſt the ſucceſſor the ſame evidence that the origi-

nals of the ſaid papers would have been, which are ſince loſt; nor that which copies in form would be: for the predeceſſor who had not the free diſpoſal of the eſtates of his benefice, could not, to the prejudice of his ſucceſſors, agree that the copies which I have taken were conformable to the original inſtruments which eſtabliſhed the legality of the alienation of this eſtate.

§. III.

Of copies made not in the preſence of the parties, and without their having been cited by the authority of the judge.

736. The copies which are made from the original, not in the preſence of the party and without his having been cited, are not commonly entire proof againſt him, of what is contained in the original, when it is loſt: this copy forms only an index or inchoate proof in writing, which may authoriſe the admiſſion of teſtimonial proof, to ſupply what is wanting in this copy.

This deciſion takes place, whether this copy has been made without the order of the judge or in virtue of ſuch order; for it is the ſame thing, whether there was an order of the judge on which the party was not cited, or whether there was none.

This deciſion applies, according to Dumoulin, even when the copy ſhould be made by the ſame notary who received the original. For example. I have executed a power of attorney to Peter in the preſence of Gomet, a notary, to ſell my houſe to James. Peter ſells my houſe to James in virtue of this power, of which the copy is inſerted at the foot of the contract of ſale; and this copy is ſigned by Gomet, who atteſts that he has copied it word for word from the original which he received. Afterwards I bring a ſuit againſt James to recover back the eſtate, and the original of the power which I have given to Peter to ſell it to him being loſt, there remains only this copy to be produced againſt me. This copy will not be full and entire proof againſt me, that I have given a power to ſell my houſe. The reaſon is, that this copy proves indeed that there was an ori-

ginal from which it has been taken, but not having been taken in my presence, it does not prove against me that the original from which it has been taken and which is not shewn, had all the characters necessary in order to be evidence: it does not prove that my signature, which is said in this copy to be at the foot of the original, was truly my signature. It is true that it is the notary who received the original and who has seen me sign the original, that attests it; but, says Dumoulin, a notary cannot attest and make full evidence of things which he is not required by the parties to attest. *Non potest testari, nisi de eo de quo rogatur à partibus:* he can only attest what he sees and understands *propriis sensibus*, at the time he attests it. At the time that he made this copy he saw only an original, but he did not see me sign it; he was not required by me to attest that there was an original duly and truly signed by me, from which he has made the copy; since it is supposed to be made in my absence, and consequently he cannot give to this copy the credit of the original; *d.* §. 8, *gl.* 1, *n.* 48, 62, 63, 64, *&c.*

737. All we have said is liable to an exception in regard to antient copies; for antient copies of instruments, whether made by the notary who received the original or even by another person, are evidence against all, for want of the original; because they recite that there was an original in form, and *in antiquis enunciativa probant.* This is shewn by Dumoulin, *ibid. n.* 41, *Si exemplum esset antiquum & de instrumento antiquo, non enim sufficeret originale fuisse antiquum, si exemplum esset recens . . . . . tunc ratione antiquitatis puto quod plene probaret contra omnes quantum ipsum originale probaret: ratio, quia habet authenticum testimonium de autoritate & tenore originalis, cui antiquitas loco cæterarum probationum quarum copiam sustulit, autoritatem plene fidei supplet.*

A copy is commonly reputed antient when it is of more than thirty or forty years; for according to Dumoulin, *ibid. n.* 81, 82, excepting the case of rights relating to things which admit only of immemorial and centenary possess

sion, in regard to which an instrument is not reputed antient till one hundred years have elapsed; in all other cases instruments are reputed antient after thirty or forty years. They may, even at the end of ten years, according to this author, pass for antient, *ad solemnitatem præsumendum, nisi agatur de gravi prejudicio alterius; ibid.* n. 83.

§. IV.

Of the register of entries.

738. The copy of a deed of gift, transcribed in the register of entries, is not evidence of the gift; otherwise it would be in the power of a dishoneſt perſon to forge a falſe deed which he would cauſe to be tranſcribed in the regiſter of entries, and to elude the proof which might be made of the forgery, by ſuppreſſing the original. But Boiceau, *part.* 1, *ch.* 11, thinks that this regiſter forms at leaſt an inchoate proof in writing, which ought to authoriſe teſtimonial evidence of the gift. Danty thinks that this deciſion is liable to much difficulty. In order that this proof might be admitted, I would at leaſt have two things concur; I. that it ſhould appear that the minutes of all the inſtruments paſſed by the notary, in the year in which it is pretended that the gift was made, are not to be found; for if there was only the minute of the pretended gift which could not be found, there would reſult a ſuſpicion from the ſuppreſſion of this inſtrument, which would create a doubt of the genuineneſs or of the form of this inſtrument, and prevent the admiſſion of proof by witneſſes. II. I think that it would be neceſſary that the donor ſhould offer to prove the gift by witneſſes who were preſent when the inſtrument was executed, or at leaſt who had heard the donor admit it; and it would not be ſufficient that the donee ſhould prove that the deed of gift has been ſeen in his hands; for the witneſſes who ſee the inſtrument, know not whether it be a true inſtrument and whether it be clothed with all the neceſſary formalities.

739. If the inſtrument had been regiſtered on the application of the donor, and he had ſubſcribed the regiſter, Boiceau holds that in this caſe the regiſter would be evi-

dence of the gift, for the same reason which has been given before, that judicial copies, made in presence of the parties, are as good evidence as the original itself, against the party who has been present.

§. V.

Of copies absolutely informal, which are not made by a public person.

740. Copies which are not made by a public person, are called absolutely informal: they are no evidence, however antient; they may at most give rise to very slight presumptions.

Nevertheless, if one had produced this informal copy to raise from it a presumption, the other party might use it against him; and it would be evidence against him, because in producing it himself, he is holden to have admitted the genuineness of it; for one ought only to produce papers which he believes to be genuine.

When a copy has been made indeed by a public person, as by a notary, but who did not cause himself to be assisted by witnesses or another notary, it is not admitted to have been made by a public person, and it is as absolutely informal as if it had been made by a private person; for a public person who does not act as a public person is not reputed to be such. *Persona publica*, says Dumoulin, *agens contra officium personæ publicæ, non est digna spectari ut persona publica.*

§. VI.

Of the copies of copies.

741. It is obvious that a copy made not from the original but from a preceding copy, although made *servato juris ordine*, can be no better evidence than the preceding copy from which it was made, and against those persons only against whom the preceding copy would have been evidence.

Sometimes indeed, although this second copy, made from the first, has been made *servato juris ordine*, it is not

equally evidence againſt the ſame perſon as the preceding copy would have been. This happens when the perſon againſt whom it is offered had not the ſame reaſons to diſpute the original, when the firſt copy was made in his preſence, as he has now to diſpute it with regard to him who has obtained the ſecond copy. Dumoulin, §. 8, *gl.* 1, *n.* 34, adduces this example. Peter, the ſervant of one of my relations of whom I am the heir, has cauſed, by virtue of an order of the judge, in preſence of my attorney, an entire copy to be taken of the will of this relation; after which he cauſes himſelf to be paid by me a legacy of one hundred crowns which was given him by the will. This copy was taken from the original which was depoſited with a notary. Afterwards James comes, who demands the payment of a legacy of ten thouſand crowns given by the ſame will, and as the original has ſince become loſt, he preſents a petition to the judge to have a copy of it taken, in my preſence, or on my being duly ſummoned, from that which Peter has cauſed to be taken from it. Dumoulin ſays that this copy made by James from that made by Peter is not an entire proof againſt me, ſuch as would be, in favor of Peter, that made by Peter from the original; becauſe, ſays he, *nova contra licendi causa subest.* I have reaſons now to contradict and conteſt the original, which I had not when Peter cauſed his copy to be taken. The legacy which Peter, demanded from me was a ſmall legacy of one hundred crowns; it was not worth the trouble of conteſting the original of the will: therefore I may have neglected the means which I had then to conteſt it; but now, when James demands from me ten thouſand crowns, I have great intereſt in examining whether the original of the will is regular. Therefore, becauſe I have indeed been willing that the copy of Peter ſhould paſs for a regular copy of the will, it does not follow from this that I ought to acknowlege the ſame thing in regard to the copy of James, taken from that of Peter.

ARTICLE IV.

Of the distinction of titles into primitive and recognitive.

742. The primitive title, as by the name it is underſtood to be, is the firſt title which has been paſſed between the parties, between whom an obligation has been contracted, and which contains this obligation. For example. The primitive title of an annuity is the contract by which it has been conſtituted. The recognitive titles are thoſe which have been paſſed ſince by the debtors, their heirs or ſucceſſors.

743. Dumoulin, *d*, §. 8, *n.* 88., diſtinguiſhes two kinds of recognitive titles or *acknowledgments*; thoſe which are in the form which is called *ex certa scientia*, and thoſe which are in what is called *forma communi*.

The acknowledgments *ex certa scientia*, which are called alſo *in forma speciali & dispositiva*, *n.* 89, are thoſe in which the tenor of the primitive title, is related. Theſe acknowledgments have this in particular, that they are equivalent to the primitive title, in caſe it ſhould be deſtroyed, and prove the exiſtence of it againſt the perſon acknowledging, provided he has the diſpoſal of his rights, and againſt his heirs and ſucceſſors. They diſpenſe conſequently with the creditor's adducing the primitive title, in the caſe in which it is found to be loſt. *Molin. ibid. n.* 89.

The acknowledgments *in forma communi* are thoſe in which the tenor of the primitive title is not recited. Theſe acknowledgments ſerve only to confirm the primitive title, and to interrupt the preſcription; but they confirm the primitive title as far only as it is regular: they do not prove its exiſtence or diſpenſe with the creditor's producing it.

Nevertheleſs, if there were ſeveral acknowledgments conformable to each other, of which ſome were antient or even one only antient, and ſupported by poſſeſſion, they might be equivalent to the primitive title, and excuſe the creditor from producing it; which takes place eſpecially when the primitive title is very antient. *Ibid. n.* 90.

744. The acknowledgments of each kind have this in common, that they are relative to the primitive title; that the perſon acknowledging, by theſe acknowledgments, is not preſumed to have intended to contract any new obligation, but only to acknowledge the old one which was contracted by the primitive title. Therefore if by the acknowledgment, he acknowledges himſelf bound to any more than, or different from, what is expreſſed in the primitive title, in producing the primitive title and ſhewing the error which has crept into the acknowledgment, he will be diſcharged therefrom.

This deciſion applies even when the error is found in a long ſeries of acknowledgments; recourſe muſt always be had to the primitive title when it is produced.

Hoc tantum interest, ſays Dumoulin, *ibid. n.* 88, *inter confirmationem in forma communi, & confirmationem ex certa scientia, quod illa (in forma communi) tanquam conditionalis & præsuppositiva non probat confirmatum; hoc (ex certa scientia) fidem de eo facit; non tamen illud in aliquo auget vel extendit, sed ad illud commensuratur, & ad ejus fines & limites restringitur, &c.* And further, §. 18, *gl.* 1, *n.* 19, he ſays in general of acknowledgments, *non interponuntur animo faciendæ novæ obligationis, sed solum animo recognoscendi; unde simplex titulus novus non est dispositorius.*

745. If the acknowledgments on the contrary are for leſs than is expreſſed in the primitive title; if there are ſeveral acknowledgments conformable to each other, and which are of thirty years, which is the time ſufficient for the preſcription to operate, or forty years, when the creditor is privileged; the creditor in ſetting forth the primitive title, could not claim more than is expreſſed in the acknowledgments, becauſe the preſcription has applied itſelf to the ſurplus.

Article V.

Of acquittances.

746. As inſtruments are paſſed for the proof of engagements, ſo they are paſſed alſo for the proof of payments. We

call theſe acquittances. An acquittance is evidence of what it contains, againſt the creditor who has given it, his heirs or ſucceſſors, whether it he paſſed before a notary or under the private ſignature of the creditor.

There are alſo certain caſes in which an acquittance is valid and is evidence without its having been paſſed before a notary, or being ſigned by the creditor. See theſe caſes *ſupra, n.* 724, 725, 726, 727, 728. Acquittances either expreſs the ſum which has been paid, without expreſſing the cauſe of the debt; or they expreſs the cauſe of the debt without expreſſing the ſum paid; or they expreſs neither the ſum which has been paid nor the cauſe of the debt; or they expreſs both.

The acquittances which expreſs the ſum which has been paid, although they do not expreſs the cauſe of the debt, are not the leſs valid; as when they are thus, *I have received of A. B. one thousand livres, this day, &c.* and in this caſe when the creditor who has given it, had at the time of the acquittance ſeveral claims againſt the debtor to whom he has given it, this debtor may apply it to that which he has the moſt intereſt to diſcharge, as we have ſeen *ſupra, Part.* 3, *ch.* 1, *art.* 7.

747. The acquittances which expreſs only the cauſe of the debt without expreſſing the ſum which has been paid, are likewiſe valid; and they are evidence of the payment of all that was due for the cauſe expreſſed in the acquittance at the time it was given. For example. If it is thus, *I have received of A. B. what he owed me for the price of my wine of Saint-Denis, which I have sold him;* this acquittance is evidence of the payment of what he owed me for the price of my wine of this place, either of the whole, if he owed me the whole, or of what remained due. But this acquittance does not extend to what is due for other cauſes than that which is expreſſed, and it is not neceſſary that I ſhould make an expreſs reſervation. For example. The acquittance which I have given you, ſuch as is expreſſed in the

inſtance above put, only includes what you owe me for the price of my wine of Saint-Denis, and you cannot oppoſe it againſt my claims for the price of the wine of my other places, which I have alſo ſold you.

When the debt of which the cauſe is expreſſed in the acquittance, is a debt which conſiſts of arrearages of annuities or rents, it is evidence of the payment of all which has accrued until the laſt day of payment preceding the date of the acquittance; but it does not extend to what has accrued ſince. For example. You have rented a houſe which belonged to me, of which the rent is to be paid on St. John's, or if you owed me a rent payable yearly on St. John's; the acquittance which I ſhould give you in theſe terms *I have received from A. B. what he owed me for rents* or indeed *what he owed me for arrearages of rent*, this 10th December 1760: this acquittance is valid for all the arrearages or rents accrued until St. John's day, 1760; but it does not extend to what has accrued ſince.

Quid, if the acquittance was not dated? The want of a date preventing one in this caſe from knowing when the acquittance was given, the debtor cannot prove by it what time has preceded the day of the acquittance and to what time he has paid. In this uncertainty, this acquittance does not prove any thing, except that the debtor has paid at leaſt one term and conſequently it cannot avail for more than the term. If he was the heir of the creditor who had given the acquittance, it would be good for all the payments due in the life time of the deceaſed; for it is not to be doubted that theſe have preceded the time of the acquittance, the heir not having had power to give it, except ſince his becoming heir and conſequently ſince the death of the deceaſed.

When the debt whereof the cauſe is expreſſed in the acquittance, is the debt of a ſum divided into ſeveral times of payment, as when my father-in law has promiſed me for the portion of his daughter, whom I have married, the ſum of twenty thouſand livres, payable in four yearly pay-

ments; the acquittance which I give him without expreſſing the ſum in theſe terms, *I have received of my father-in law what he owed me for the portion of my wife*, ought likewiſe to comprehend only the payments which were due at the time of the acquittance and ought not to extend to thoſe which were not then due: for although a ſum whereof the time of payment is not yet come, is not the leſs due, in a very true ſenſe, yet in common language, according to which the acquittance ſhould be underſtood, theſe terms *what he owed* refer only to what could be demanded and of which the time of payment has arrived; it is in this ſenſe that we commonly ſay, HE WHO HAS TIME DOES NOT OWE. *Loysel.* Beſides it is not to be preſumed that a debtor pays before the time.

There would be much more difficulty if the acquittance was expreſſed in theſe terms; *I have received the portion of my wife.* Theſe general and indefinite terms appear to comprehend the whole portion, and conſequently even the parts whereof the time of payment had not yet arrived at the date of the acquittance.

748. When the acquittance expreſſes neither the ſum which has been paid nor the cauſe of the debt which has been diſcharged, as when it is expreſſed in theſe terms, *I have received from A. B. what he owed me, &c.* this acquittance is a general one which comprehends all the different debts which were due at the time of the acquittance, to him who has given it, from him to whom it has been given. If among theſe debts there were ſome which were demandable at the time of the date of the acquittance, and others whereof the time of payment had not then arrived, the acquittance would not extend to theſe, for the reaſons already deduced above.

A fortiori, the acquittance ought not to extend to the principal of annuities due by the debtor; it comprehends only the arrearages which had become due at the laſt term preceding the date of the acquittance.

We muſt alſo except from this acquittance the debts

of which the creditor who has given it, had not probably any knowlege. For example. If at the time of the acquittance you were on your own account my creditor of certain ſums, and of other ſums as heir of Peter, to whom you had already ſucceeded, but the inventory was not yet made; the general acquittance which you have given me in theſe terms, *I have received of A. B. what he owed me*, does not comprehend what I owed to the eſtate of Peter: for as, at the time of your acquittance, you had not any knowlege of the effects of the eſtate of Peter, although you had already ſucceeded to it, you ought not to be preſumed to have compriſed in this acquittance the debt which I owed you in your quality of heir of Peter, of which probably you had no knowledge.

If I owed you certain ſums on my own account, and others as a ſecurity for another perſon, do theſe terms of the acquittance which you have given me, *I have received of A. B. what he owed me*, comprehend the ſums which I owed you as a ſecurity? The reaſon to doubt is, that theſe terms *what he owed me*, taken literally in their general import, ſeem to comprehend them; for I owe in reality what I owe as a ſecurity. Nevertheleſs, I think it muſt be preſumed that you have intended by theſe terms *what he owed me*, only what I owed *proprio nomine*, and not what I owed you as a ſecurity; I. becauſe, being able to defend myſelf from paying what I owed you as a ſecurity, until after a diſcuſſion of the property of the principal debtor, I did not owe it in the manner and in the ſenſe which theſe words generally import, before the diſcuſſion and at the time of the acquittance; II. becauſe, having a recourſe againſt thoſe for whom I was a ſecurity for what I might have paid, it is not to be preſumed that in paying for them, I ſhould not have taken ſeparate acquittances for the ſum I paid for them, and that I ſhould have contented myſelf with ſo general an acquittance.

If among the ſums which I owed you at the time of the general acquittance which you gave me, there was a

ſum mentioned in a note which remained with you, would it be compriſed in it? The reaſon to doubt ariſes from the note remaining with you, which you ought to have given to me, and which, if I had paid it, ought not to have remained with you. The reaſon to decide that it is compriſed in it, ariſes from the generality of the expreſſion *which he owed me*, which includes all the debts which I then owed you. It may have happened that, truſting to my general acquittance, I neglected taking up my note, which you might have miſlaid.

749. The fourth kind of acquittances is that in which the ſum that has been paid, and the cauſe of the debt that has been diſcharged, are expreſſed. This can hardly occaſion any difficulty. If the ſum paid exceeded that which was due for the cauſe expreſſed in the acquittance, the debtor, ſuppoſing he owed nothing elſe, would have a right to claim back this exceſs, *per condictionem indebiti:* if he were debtor for other cauſes he might apply this exceſs to that which he has the moſt intereſt to diſcharge.

The queſtion whether the acquittances of one or ſeveral years' arrearages creates a preſumption of the payment of thoſe of the preceding years, is treated of *infra, ch.* 3, §. 2, *art.* 2.

CHAPTER II.

Of oral or teſtimonial proof.

ORAL or teſtimonial proof is that which is made by the depoſition of witneſſes.

Article the First.

General principles upon the cases in which this proof is admitted.

750. The corruption of morals, and the frequent examples of the ſubornation of witneſſes, have rendered us much more cautious in admitting teſtimonial proof than the Romans were. To prevent this ſubornation of witneſſes,

the ordinance of Moulins, of the year 1566, *art.* 54, ordains that for all things exceeding the value of one hundred livres, written contracts ſhall be made, by which only ſhall be received all proof of the ſaid things, without admitting any proof by witneſſes, beſides what is contained in the ſaid contracts.

This law has been confirmed by the ordinance of 1667, *tit.* 20, *art.* 2, which is thus expreſſed: "Inſtruments of "writing ſhall be paſſed before notaries or under private "ſignature for all things exceeding the value of one hun-"dred livres; and no proof by witneſſes ſhall be received "againſt or beſides the contents of theſe inſtruments, al-"though the ſum in queſtion be leſs than one hundred "livres."

In the following article the ordinance excepts the caſe of unforeſeen accidents, and the caſe in which there is an inchoate proof in writing.

There is alſo in the firſt article an exception in regard to what is obſerved in the Juriſdiction of Conſuls.

From this diſpoſition of the ordinance may be derived four general principles which decide the caſes in which teſtimonial proof ought to be admitted or rejected.

Theſe principles are, I. he who had it in his power to procure literal proof, is not admitted to bring teſtimonial proof, when the thing exceeds one hundred livres, if there is no inchoate proof in writing.

II. When there is an inſtrument in writing, thoſe who were parties, their heirs or ſucceſſors, cannot be admitted to teſtimonial proof contrary to or beſides this inſtrument, even when the thing ſhould not exceed one hundred livres; if they have no inchoate proof in writing.

III. One is admitted to teſtimonial proof of things of which literal proof could not be obtained, to whatever ſum they may amount.

IV. Likewiſe, when by an accidental and unforeſeen circumſtance, acknowledged by the parties or proved, the

literal proof is loſt, one is admitted to teſtimonial proof, to whatever ſum the thing may amount.

ARTICLE II.

FIRST PRINCIPLE. He who had it in his power to procure written proof, is not admitted to testimonial proof for things which exceed one hundred livres.

751. The ordinance of Moulins ſays, "we ordain that "for all things exceeding the ſum or value of one hundred "livres, for a ſingle payment, there ſhall be written con- "tracts &c."

The ordinance of 1667, *tit.* 2 *art.* 2, ſays, "there ſhall "be inſtruments of writing for all things exceeding the value "of one hundred livres."

Although the ordinance of Moulins has not ſaid *for all agreements*, but has made uſe of the term *things*, which is a more general term than *agreements*, yet the commentators upon this ordinance think that it includes in its diſpoſition agreements only; becauſe this ordinance ſays there ſhall be *contracts* in writing, and this term *contracts* includes only agreements.

The ordinance of 1667 having avoided the uſe of this term *contracts*, and having ſaid, *there shall be instruments of writing for all things*, we ought not to think that its diſpoſition includes agreements only, but generally all things of which he who demands to offer proof, had the power to procure proof in writing. For example although the payment of a debt is not an agreement, yet the debtor who makes it, having had it in his power to take an acquittance in writing, is not admitted to prove it by witneſſes, when this payment exceeds one hundred livres.

752. It was doubted before the ordinance of 1667, whether a voluntary depoſit was compriſed in the law of Moulins, which ordains that there ſhall be an inſtrument of writing for all things exceeding one hundred livres, and excludes teſtimonial proof thereof. The reaſon to doubt was, that it is not common to take inſtruments of writing

for depoſits; that he who requeſts his friend to take charge of the things which he confides to him to keep, does not commonly think proper to demand an acknowledgment from the depoſitary, who only receives the depoſit to accommodate him. Notwithſtanding theſe reaſons, the ordinance of 1667, *tit.* 20, *art.* 2, has decided that a voluntary depoſit was compriſed in the general rule, and that proof of it by witneſſes ought not to be admitted; becauſe he who made the depoſit, either ought not to have made it, which he was not obliged to do; or when he made it, he ought to have required an acknowledgment from the depoſitary: not having required this acknowledgment, he ought to run the riſque of the faith of the depoſitary, and ought to blame himſelf alone for having too eaſily truſted him, if he prove unfaithful.

Some deciſions before the ordinance of 1667, had alſo admitted teſtimonial proof of the loan to uſe; becauſe this loan, like the depoſit, is commonly made between friends without taking an acknowledgment of it in writing. But the ordinance of 1667 having declared that a voluntary depoſit was compriſed in the general law, which requires written proof, we ought, *a fortiori*, to conclude the ſame thing in regard to the loan for uſe; ſince confidence is placed as well in him with whom the depoſit is made, as in him to whom the loan is made; and he who makes a depoſit has more reaſon to fear offending his friend by demanding from him an acknowledgment of it, than he who makes the loan.

753. It has alſo been queſtioned whether the bargains made in fairs and markets ought to be compriſed in the diſpoſition of the ordinance. The reaſon to doubt was, that theſe bargains are commonly made verbally; that there is no notary preſent, when they are made, to reduce them to writing. Nevertheleſs it has been decided that theſe bargains ought to be compriſed therein; becauſe as there are notaries now eſtabliſhed in the ſmalleſt towns, and conſequently in all the places where fairs are holden, it is not difficult for the parties, when they make a bargain on credit,

to call in a notary to reduce it to writing, if they do not know how to write. This is the opinion of Boiceau, 1, 9.

Obſerve however that in regard to bargains made between merchant and merchant, whether in or out of fairs, the conſular judges who have cognizance of them, are not bound by the diſpoſition of the ordinance, and that they may, according to circumſtances, admit teſtimonial proof of them, although the object exceeds the ſum of one hundred livres. It appears by the debates upon the ordinance of 1667, that the conſular judges had maintained this cuſtom, notwithſtanding the ordinance of Moulins: that of 1667 expreſsly ſupports them in this by theſe terms at the end of the article 2, *without innovating at all in regard to what is obſerved in the juriſdiction of conſuls.*

754. When a perſon demands the damages which he claims to be due him, for the inexecution of a verbal agreement to do or not to do ſomething, and it is uncertain whether the value of theſe damages ought to amount to the ſum of one hundred livres, in order to be admitted to teſtimonial proof of the agreement, the inexecution of which gives riſe to the damages claimed, the plaintiff ſhould reſtrict the demand for the ſaid damages to a certain ſum which does not exceed that of one hundred livres. He ought even to reſtrict it at firſt: for if he had once demanded a greater ſum, having himſelf acknowledged that the object of the agreement exceeded one hundred livres, and that the agreement was conſequently compriſed in the diſpoſition of the ordinance, he could not, in reſtricting himſelf afterwards, be admitted to offer teſtimonial proof. We may derive, in favor of this deciſion, an argument from a caſe of December 17, 1638, reported by Bardet, 7. 46, in the inſtance in which a taylor, who had demanded the ſum of two hundred livres from a widow for clothes furniſhed to her huſband, was excluded from teſtimonial proof which he offered, that this widow had acknowledged the debt, although he reſtricted his claim to one hundred livres.

755. I demand of you ſixty livres, the ſum remaining

of the price of a thing which I pretend to have sold you for two hundred livres; you deny having purchased any thing from me. Ought I to be admitted to testimonial proof of this sale? Boiceau, 1, 18, decides in the affirmative. He cites laws which do not appear to me to apply. It is true indeed that when a question arises respecting the jurisdiction of the judge, which is limited to a certain sum, *quantum petatur quærendum est, non quantum debeatur*; L. 19, §. 1, ff. *de jurisdic.*; because the judge decides only upon what is demanded. But in this instance, to know whether the proof of the agreement ought to be permitted to the plaintiff, it is necessary to know whether it is an agreement for which the ordinance would require an instrument of writing. This is decided by the object of the agreement, which exceeded one hundred livres, and not by what remains due; he cannot therefore be admitted to prove it by witnesses, although there remains due only sixty livres. This is the opinion of the commentators upon Boiceau.

For the same reason, if, as heir of my father for a fourth part, I demand of you fifty livres for the fourth of two hundred livres which I pretend were lent you by my father, I shall not be admitted to the proof of the loan by witnesses.

756. But if, in either case, the plaintiff offered testimonial proof, not of the sale made for the price of two hundred livres, not of the loan of two hundred livres made by the deceased, but of the promise which the defendant made to him to pay him the sixty livres which remained due of the price of this sale, or the fifty livres which were due to him for his fourth part, I think he ought to be admitted to the proof: for this promise is a new agreement confirming the first; and the object of this new agreement not exceeding one hundred livres, nothing prevents testimonial proof from being admitted.

757. When several claims do not exceed each the sum of one hundred livres, but altogether do exceed it, ought testimonial proof of all these claims to be admitted? It would seem that it ought to be; for the ordinance having required

inſtruments of writing for the things only which exceed one hundred livres, it ſeems that the plaintiff ought not to be blamed for not procuring written proof, and that teſtimonial proof ought not to be refuſed. Nevertheleſs the ordinance of 1667, *tit.* 20. *art.* 5, decides that it ought to be refuſed; for the intention of the ordinance, in rejecting this proof, having been that individuals ſhould not be expoſed to the riſque of the ſubornation of witneſſes for conſiderable ſums exceeding one hundred livres, which might be demanded of them by knaves, it ought to be rejected, whether this ſum be claimed for a ſingle or for ſeveral cauſes; it being as eaſy to ſuborn witneſſes to ſwear to ſeveral falſe claims, as to ſuborn them to ſwear to a ſingle one. In regard to the objection, the anſwer is that the creditor is not obliged to procure literal proof while his claims do not exceed one hundred livres; but when to thoſe which do not exceed this ſum there is added a new one which makes the whole amount of all his claims more than one hundred livres, there ought to be an inſtrument of writing.

The ordinance makes an exception, which is when the claims or rights proceed from different perſons. Therefore I may be received to prove a loan of ſixty livres which I demand of you on my own account, and another of eighty livres which I demand of you as heir of my father, by whom I pretend that this ſum has been lent you, although theſe ſums exceed one hundred livres.

ARTICLE III.

SECOND PRINCIPLE. That teſtimonial proof is not admitted contrary to a writing, nor beſides what it contains.

758. Literal proof is preferred in our law to teſtimonial: therefore the ordinance forbids the admiſſion of teſtimonial proof contrary to what is contained in a writing. For example. If I have made to A. B. my note by which I have acknowleged to owe him ſixty-ſix livres which he has lent me and which I promiſe to return him in two years, I ſhall not be received to prove by witneſſes that I have only received ſixty and that the ſurplus was for intereſt which

he had required me to include in my note: for this proof would be contrary to what is contained in a writing. I muſt blame myſelf alone for having made or written this note.

759. The ordinance not only excludes the proof by witneſſes of what would be directly contrary to an inſtrument of writing; it does not permit the admiſſion of any thing beſides the contents of theſe inſtruments, neither of what ſhould be alledged to have been ſaid *at the time, before or ſince*: for as they have made an inſtrument of writing, the party muſt blame himſelf alone for not having then expreſſed what he now alledges.

For example. The debtor will not be received to prove by witneſſes that there has been granted him a certain time for the payment, if it is not expreſſed in the inſtrument; neither of the parties will be admitted to prove that a certain place was agreed upon for the payment, if the inſtrument does not expreſs it.

A fortiori, the creditor will not be admitted to prove by witneſſes that there is more due him than is expreſſed in the inſtrument.

760. It would be an endeavour to prove ſomething beſides the contents of an inſtrument, to demand what is contained in a poſtſcript or marginal note not ſigned, nor even marked by the parties, although written in the hand of the notary; for theſe poſtſcripts or marginal notes, not ſigned nor even marked, cannot be preſumed to make part of the inſtrument. *Puta*, if in the margin of a leaſe by which the tenant obliges himſelf to pay ſix hundred livres of rent every year, there was a marginal note, *ſix capons besides*, the leſſor would not be admitted to prove by witneſſes that the tenant agreed to pay him the ſaid capons. *Dunty* 11, 4. *in fin.*

Quid, if the poſtſcript were written in the hand of the tenant? See *ſupra*, *n.* 728.

761. When there is an inſtrument of writing of a bargain, and the time and place where it has been made is not expreſſed, may theſe be proved by witneſſes? For ex-

ample. When a debtor demands to be admitted to the benefit of insolvency, may the creditor, in order to prevent him, be admitted to prove by witnesses that the contract which makes the cause of his claim, and of which there is an instrument of writing, has been made in a fair, although this was not expressed in the instrument? Danty, l. 9, *in fine*, decides that he may be admitted to this proof, and that this proof of the place where the bargain is made, is not a proof besides the contents of the instrument, the place and the time in which the bargain is made being only extrinsic circumstances of the agreement, and not making part of the agreement contained in the instrument. This decision is liable to some difficulty.

762. All testimonial proof contrary to the contents of an instrument being interdicted, a party would not be received to explain by witnesses who were present at the making of the instrument, nor even by the notaries who received it, what is therein contained, and to prove by them what was agreed upon at the time of the execution. *Domat, p.* 1, *l.* 3, *t.* 6, §. 2, *n.* 7.

763. This rejection of testimonial proof contrary to or besides the contents of an instrument applies without distinction, even when the thing should be under the value of one hundred livres: the ordinance of 1667, *t.* 20, *art.* 2, is formally explicit in regard to this.

764. May he who, by an instrument of writing, is debtor of a sum less than one hundred livres be admitted to prove by witnesses the payment of this debt or a part? It seems that he ought to be admitted, and that the disposition of the ordinance which rejects the proof by witnesses contrary to or besides the contents of the instrument does not here apply; for the debtor in demanding to prove this payment, does not demand to prove a thing contrary to the instrument which contains his obligation; he does not attack this instrument: he admits every thing therein contained. It is not therefore a proof which he offers contrary to the instrument, and which may be said to be excluded by the

ordinance. However I find that in practice, whether by a bad interpretation which has been given to the ordinance, or for ſome other reaſon, teſtimonial proof of the payment of a debt of which there is an inſtrument of writing, is refuſed.

765. Obſerve that the ordinance excludes proof by witneſſes contrary to what is contained in the inſtrument, only becauſe it was in the power of the parties to procure written proof. But if a party alledges againſt an inſtrument, facts of violence exerciſed againſt him to conſtrain him to make the inſtrument; facts of deceit by which he pretends that his conſent or ſignature has been taken by ſurpriſe; and other like facts; as it was not in his power to have proof by writing of theſe facts, there is no doubt that he ought to be admitted to prove them by witneſſes, although he ſhould attack the inſtrument *civiliter*.

A fortiori, when there is room to attack it *criminaliter*; as when it is alledged that the inſtrument contains ſome enormous uſury which deſerves to be proſecuted in an extraordinary manner.

766. It remains to be obſerved that the rejection of teſtimonial proof againſt or beſides the contents of the inſtrument applies only to thoſe who were parties, who ought to blame themſelves alone for having admitted what is there compriſed, and not having taken ſome inſtrument of defeaſance or having omitted ſomething which ſhould have been inſerted; but this cannot affect third perſons in fraud of whom one ſhould recite in theſe inſtruments things contrary to the truth of what has taken place: for no fault or neglect being imputable to theſe third perſons, we ought not to refuſe to them teſtimonial proof of the fraud which is made upon them; ſince it was not in their power to have any other.

Therefore a lord may be received to prove by witneſſes, contrary to a contract of ſale, that the eſtate was ſold for a price more conſiderable, than that which has been expreſſed, with a view to diminiſh the profits which are due

him. *Vice versa*, a perſon having a right of redemption, will be admitted to prove by witneſſes that the eſtate was ſold for a price leſs conſiderable than that which has been expreſſed, and that the price was enlarged in fraud of the right of redemption. We may adduce other examples of theſe frauds.

ARTICLE IV.

Of inchoate proof in writing.

767. The firſt kind of inchoate proof in writing is when one has againſt another, by an authentic inſtrument to which he was a party, or by a private writing, written or ſigned by him, proof, not indeed of the truth of the whole fact which is advanced, but of ſomething which leads to, or makes a part of it.

It is left to the diſcretion of the judge to determine the degree of the inchoate proof in writing, in order, on this degree of proof, to admit teſtimonial proof.

Boiceau adduces ſeveral examples of this inchoate proof in writing. Firſt example. You bring a ſuit againſt me for a piece of land of which I am in poſſeſſion. I plead that you ſold it to me and that I paid you the price of it. I have no other proof than a writing ſubſcribed by you, by which you promiſed to ſell it to me for a certain price. This writing does not prove the ſale, much leſs the payment of the price; but, joined to the poſſeſſion in which I am of the land, it conſtitutes, according to this author, an inchoate proof, ſufficient to admit me to teſtimonial proof of the ſale. *Boiceau*, 11, 10.

Danty, *ibid.*, obſerves that this deciſion ought to admit of an exception when the promiſe to ſell expreſſed that a contract of ſale ſhould be entered into before a notary; for the parties having declared it was their intention that an inſtrument of writing ſhould be executed before a notary, we ought not to believe that the ſale took place unleſs ſuch an inſtrument ſhould be produced.

I think that even in the caſe when the promiſe to ſell

did not expreſs that a contract ſhould be entered into before a notary, the judge ought to be very cautious in conſidering it as an inchoate proof of the ſale, and that he ought not thereon to admit teſtimonial proof, if the land in queſtion was of any conſiderable value; it not being preſumable that a piece of land of any conſiderable value ſhould be ſold without an inſtrument of writing.

Second example. I demand of you fifty crowns for the price of certain merchandiſes which I have ſold and delivered to you: I have no other proof than your note which expreſſes, *I promise to pay to A. B. the sum of one hundred and fifty livres for the price of certain merchandises which he is to deliver me.* This is not a complete proof of my claim, ſince the note does not prove that I have delivered theſe merchandiſes; but it is an inchoate proof, which ought to authoriſe the admiſſion of teſtimonial proof of the delivery. *Boiceau, ibid. Danty.*

Third example. You have given me a power of attorney *ad resignandum*, of your office. Before I obtain a commiſſion, you revoke it. I maintain that you ſold me this office for a certain ſum, which I have paid you; and that you cannot therefore revoke your power of attorney without reſtoring to me the price. I have no other proof of what I advance than the power *ad resignandum*, which you have given me. This power does not form a proof of the ſale, ſtill leſs of the payment of the price; but it is proof of a fact which relates to it, which may conſequently paſs for an inchoate proof, and which ought to authoriſe the admiſſion of teſtimonial proof of the ſale, and of the payment of the price. This is the opinion of Loyſeau in his treatiſe on offices, I, 11, 61, cited by Danty, 11, 1, 14.

768. Fourth example. You have written me a letter by which you requeſt me to pay to your ſon, the bearer of the letter, one hundred and fifty livres of which he has need in his ſtudies. I bring a ſuit againſt you for the repayment of this ſum. I have omitted to take a receipt from your ſon; but I have your letter, which he left with me:

this letter in my poſſeſſion is not an entire proof that I have paid this ſum according to your order; but it is an inchoate proof in writing, which ought to authoriſe the admiſſion of proof by witneſſes.

If the perſon to whom the letter was written was not willing to pay the money and your ſon applied to another, who paid him the money and kept the letter; this letter in the poſſeſſion of a third perſon to whom it was not written, would be a leſs proof than in the preceding caſe; yet Danty, 11, 2, 11, judges it, even in this caſe, ſufficient to admit this third perſon to proof by witneſſes.

If the perſon to whom I wrote to you to pay this ſum, was a perſon againſt whom I might claim it back; on your neglecting to take his receipt, you would not be admitted to teſtimonial proof againſt me: for granting that you have paid it, you cannot demand it from me, becauſe you have neglected to take a receipt which is neceſſary to enable me to recover it back.

769. If I have lent a minor a ſum of money and demand from him the repayment of it, contending that it has been employed to his advantage; the note which I have from him, proving the loan, ought not to be regarded as an inchoate proof ſufficient to authoriſe the admiſſion of proof by witneſſes, that the minor has advantageouſly employed the money; for this would render it eaſy for uſurers to lend money to minors, and to recover it back by falſe witneſſes who ſhould teſtify to the uſe. *Danty*, 11, 4, 3.

770. A ſecond kind of inchoate proof in writing is when I have againſt another by an authentic writing, to which he was a party, or by a private writing ſigned by him, proof that he is my debtor, without having proof of the ſum: this is an inchoate proof in writing, which ought to admit me to proof of the ſum by witneſſes.

Firſt example. I demand of you the payment of one hundred crowns; I have your note, which expreſſes, *I promiſe to pay to A. B. the ſum of one hundred..... which he has*

lent me. The word *crowns* has been omitted in the note. You pretend that you borrowed only one hundred sous, which you tender. Your note is an inchoate proof in writing, which ought to admit me to testimonial proof of the loan of one hundred crowns.

Nota, if I fail in making this proof, I can only demand the one hundred sous; according to the rule, *semper in obscuris quod minimum est sequimur.* Observe also that in order to be admitted to testimonial proof, there ought to be some probability in the amount of the sum which I pretend to have lent you; therefore, in the instance put, I would not be admitted to prove by witnesses that I lent you one hundred thousand livres.

Another example of an inchoate proof in writing. I demand of you one hundred pistoles which I claim to have given you in deposit. I have no receipt for this deposit; but I have your letter by which you acknowlege yourself my debtor, without expressing of what sum, in these terms, *I will satisfy you in regard to what you know.* This letter does not contain the proof of the deposit of one hundred pistoles; but it proves that you are my debtor, which is an inchoate proof in writing that ought to admit me to testimonial proof. *Case reported by Chassanee, and cited by Danty*, 11, 1, 14.

771. Private writings, not signed, form against him who has written them, a third kind of inchoate proof in writing of what they contain. For example. I demand of you thirty pistoles which I claim to have lent you: I produce a note in which you acknowleged the loan, written in your hand and dated, but not signed. This note does not suffice to prove the loan, but it may, according to circumstances, form an inchoate proof in writing, which ought to admit me to proof by witnesses.

A fortiori, a receipt written in the hand of the creditor, although not signed, in the possession of the debtor, is an inchoate proof in writing of the payment, which ought to admit the debtor to testimonial proof; proof of the discharge being still more to be favored.

Obſerve however that in order that an acquittance, not ſigned, may be an inchoate proof in writing of the payment of the debt, it is neceſſary that the debt in diſcharge of which the payment is made, ſhould be expreſſed; a vague receipt, not ſigned, makes no inchoate proof in writing; *Danty, ibid.*

In certain caſes indeed, an acquittance, not ſigned, may be entire proof; as when it is written on the journal of the creditor, or on the back of a promiſſory note.

772. According to the principles we have juſt eſtabliſhed, inchoate proof in writing ought to reſult, either from a public inſtrument in which he againſt whom the proof is to be produced has been a party, or from a private inſtrument ſigned by him, or at leaſt written in his hand.

This inſtrument written by him who demands to offer the proof, cannot avail him as an inchoate proof, becauſe one cannot make titles or evidence for himſelf.

It is neceſſary however to except from this deciſion the books of merchants, which, when they are regular, are inchoate proof in favor of thoſe who wrote them, as we have obſerved *ſupra, chap.* 1, *art.* 2, §. 4.

773. The writing of a third perſon cannot make the inchoate proof in writing which the ordinance requires; for this third perſon is only as a witneſs, and what he has declared in writing can only be equivalent to teſtimonial proof. Hence ariſes the deciſion of the queſtion whether the acknowledgment which a widow has made, by her inventory, of a debt of the community, ought to be regarded as an inchoate proof in writing againſt the heirs of her huſband? I do not think it ought: for the widow can only be conſidered as a witneſs in regard to the heirs of her huſband, for the part which is demanded from them; and conſequently the acknowledgment which ſhe makes by the inventory, is, in regard to the heirs, equivalent only to the depoſition of a witneſs, and ought not, it ſeems, to form againſt them an inchoate proof in writing. Yet Vrevin, on

Such are neceſſary depoſits in caſe of fire, ruin, inſurrection, ſhipwreck. The ordinance of 1667, *tit.* 20, *art.* 3, expreſsly excepts them from the diſpoſition which excludes proof by witneſſes above one hundred livres.

For example. If in the accident of fire, or of the ruin of a houſe which thereby falls to the ground, he who dwells in it haſtily depoſits in his neighbour's houſe the furniture which he has ſaved from the flames or from the ruin, and his neighbour denies the depoſit, he will be admitted to proof by witneſſes of the things he has depoſited, to whatever ſum their value may amount; for the haſte in which he was obliged to make this depoſit, did not permit him to procure proof in writing.

It is the ſame when, at the time of an inſurrection or invaſion, I remove by a back door my goods, which I give to the firſt perſon I meet, to ſave them from the pillage of the inſurgents or enemies, who are ready to enter my houſe; or when a veſſel is caſt on ſhore, I haſtily truſt my goods to the firſt perſon that comes. In all ſuch caſes it is obvious that a written proof of ſuch depoſits could not be procured; therefore the ordinance of 1667 permits the proof by witneſſes.

780. For a like reaſon, the ordinance on the ſame title, *art.* 4, admits teſtimonial proof of depoſits made by travellers to the keeper of the inn in which they lodge. For inſtruments of writing are not taken for ſuch depoſits. An innkeeper would not have time to make an inventory of all the things which travellers that come to his houſe, at every hour of the day and night, depoſit with him.

Article VI.

Fourth principle. *He who has by accident loſt the literal proof, ought to be admitted to teſtimonial proof.*

781. The ſame reaſon that obliges us to admit teſtimonial proof, when literal proof was not to be procured, obliges us to admit teſtimonial proof, when, by an unforeſeen accident, the papers which ſerved for literal proof are loſt.

For example. If, at a fire or in the pillage of my houſe, I have loſt my papers, among which were notes from my debtor to whom I had lent money, or receipts of ſums which I had paid to my creditor, whatever may be the amount of ſuch notes or receipts, I ought to be admitted to prove by witneſſes the ſums which I have lent or paid; becauſe it is by an unforeſeen accident without any fault of mine that I have loſt the notes and receipts which formed my literal proof.

I may make this proof by witneſſes, who depoſe that they have ſeen in my hands before the fire the notes of my debtor or the receipts of my creditor, whoſe hand-writing they know and the tenor of which they remember; or who may depoſe that they have a knowledge of the debt or payment.

But in order that the judge may admit the proof, it is neceſſary that the accident which has occaſioned the loſs of the papers that conſtitute the literal proof, ſhould be apparent.

For example. In the above caſes it is neceſſary that it ſhould be admitted by the parties that my houſe was burnt or pillaged, or that I ſhould be able to prove it, before I can be admitted to introduce teſtimonial proof of the loans of money or payments of which I pretend to have loſt the notes or receipts.

If he who requires to be admitted to teſtimonial proof, alledges merely that he has loſt his papers, without there being any apparent *vis major*, through which he loſt them, he cannot be admitted to prove by witneſſes that theſe papers once exiſted: otherwiſe the ordinance which forbids the proof by witneſſes, to prevent the ſubornation of witneſſes, would be illuſory. For it would not be more difficult to one who wiſhed to introduce proof by witneſſes of a loan or a payment which he had not made, to ſuborn witneſſes who would depoſe that they ſaw in his hands the obligations and receipts, than to ſuborn thoſe who would ſay that they ſaw him count the money.

Article VII.

How testimonial proof is made.

782. When the creditor demands to make proof of the obligation which he contends the other party has contracted towards him, and likewise when a debtor offers proof of the payment which he pretends to have made of the sum that is demanded of him; if, according to the principles established in the preceding article, the proof is admissible, the judge gives an interlocutory judgment, by which he permits the party to make the testimonial proof he offers; saving to the other party the right of proving the contrary.

This judgment is called a judgment of inquest. In execution of this judgment the parties ought in the time, and according to the forms prescribed by the ordinance of 1667, *tit.* 22, produce their witnesses before the judge or a commissioner; and an instrument of writing is drawn out, including their depositions, which is called an inquest.

783. That the inquest may contain testimonial proof of the fact which the party undertook to prove, it is necessary that this fact should be attested by two witnesses at least, whose depositions are valid.

The testimony of one witness can make no proof, however worthy of credit he may be, and whatever may be his dignity; *etiamsi præclaræ curiæ hujus præfulgeat*, L. 9, *Cod. de testib.* But a single witness makes a half-proof, which being supported by the oath of the party, may sometimes, in very small matters, complete the proof.

It is on this principle that our custom of Orleans, *art.* 156, decides that when one has suffered his cattle to feed on the land of another, and they have done injury thereto, the proof of the obligation resulting from the trespass, may be made by one witness and the oath of the plaintiff, provided he claim no more than twenty sous, if the trespass was committed in the day, and forty sous if it was done at night. *Articles* 160 & 161.

When one claims two different sums, to the proof of

which he is admitted, he ought to prove each ſum by the teſtimony of two witneſſes. If he had the depoſitions of two witneſſes, one of whom proved one ſum, and the other the other, each being proved by one witneſs only, neither would be ſufficiently proved.

It would be the ſame if a debtor had been admitted to the proof of two ſeveral payments. It would be requiſite that each payment ſhould be proved by two witneſſes.

Quid, if I have been admitted to the proof of a ſingle claim, and to prove it I introduced ſeveral witneſſes, each of whom depoſed to different facts proving this claim, and none of theſe facts were proved by more than one witneſs? Will the uniting of all theſe particular witneſſes to each fact be a complete proof of the claim? For example: If I have been admitted to prove that I lent you ten piſtoles, and a witneſs ſhould depoſe to have been preſent at the loan and ſeen me count the money; a ſecond to have heard you acknowledge the debt: will theſe two ſingle witneſſes to each fact be a complete evidence of the loan. *Cravett. de antiq. temporum, 17th vol. de tract. p.* 175, *n.* 15, *& ſeq.*, determines this queſtion in the affirmative. The reaſon is, that as the acknowledgment you have made of the loan, ſuppoſes the loan, the depoſition of the ſecond witneſs conſpires with that of the firſt to atteſt the loan. They both teſtify to have knowledge of the loan; the loan which is the only fact to the proof of which I have been admitted, is then atteſted by two witneſſes, and conſequently fully proved.

It would be the ſame, if neither of the witneſſes had been preſent at the loan and the firſt witneſs depoſed to an acknowledgment of the loan made by you in his preſence at a certain time, and the ſecond to an acknowledgment which you made in his preſence at another time, the loan would be fully proved by the teſtimony of two witneſſes; for they both join in depoſing that they have knowledge of this loan: the time within which you made the acknowledgment being indifferent as to the teſtimony which they give

of the loan, it ought to be indifferent whether they depose to an acknowledgment made at the same time, or whether they depose to several acknowledgments made at different times; it suffices that they each depose that they have knowledge of the loan. It is indifferent in what manner they have this knowledge; it is indifferent whether it was the same acknowledgment made in their presence, or different acknowledgments made in the presence of each of them, which afforded them this knowledge.

784. Although two witnesses suffice to make the proof of a fact, yet as the party who has been admitted to offer the proof is not certain as to what the witnesses will depose, he may extend their number to ten, upon the same fact: the addition he should make of more than this number ought not to be taxed in the costs adjudged against the other party. *Ordinance* 1667, *tit.* 22, *art.* 21.

785. In order that a deposition may be valid, it is necessary, I. that it should not be defective in form; otherwise it is declared null, and the judge does not regard it. See, on these forms, *ordinance* 1667, *tit.* 22.

Observe that when the deposition of a witness has been declared null for the act of the judge, who has omitted some formalities required in the examination of witnesses, the party who produced this witness is admitted to have him examined anew; *tit.* 22, *art.* 86: but when the nullity proceeds from the party, who has omitted some requisite formalities in the execution of the inquest, he cannot have him re-examined.

In order that a deposition may be valid, it is necessary, II. that it should not have been rejected for any cause of challenge to the witness. We shall see in the following article what are the causes of challenge.

786. In order that a deposition may be valid, it is necessary, III. that it should contain nothing in itself which might render the truth of it suspicious. Therefore a deposition ought to be rejected when it contains contradictions, or things entirely improbable.

It is neceſſary above all, in order that a depoſition may be valid, that the witneſs who ſays he has knowledge of the fact, ſhould explain how he has this knowledge; L. 4, *Cod. de test.* Bartolus, *ad d.* L. For example. If I would prove that you have ſold me a certain thing, it does not ſuffice that the witneſs ſhould ſay in vague terms that he knows you ſold me this thing; it is neceſſary that he ſhould explain how he has this knowledge, by ſaying, for example, that he was preſent at the bargain, or that he heard you ſay you had made to me this ſale; if he ſaid that he knew it from having heard a third perſon ſay ſo, his depoſition would not be proof.

787. The proof which a party has made by the depoſition of two or more witneſſes who have atteſted the fact by him advanced, is valid only when it is not deſtroyed by the inqueſt of the other party, who on his ſide has produced witneſſes atteſting the contrary. For example. If in an action for ſlander, I introduced witneſſes who ſaid that they were preſent at the quarrel, and that you ſpoke the words, which I did not retort; and on your ſide you introduced witneſſes who ſaid that it was I who ſpoke the words, which you did not retort, the inqueſts in this caſe mutually deſtroy each other; and there reſults no proof from either ſide.

But if my witneſſes were in much greater number than yours; or indeed if mine were good citizens, of known probity, and yours were people of the loweſt claſs; the proof which reſults from my inqueſt ought to prevail, and would not be deſtroyed by yours; *arg.* L. 3, §. 2, ff. *de test. Numerus testium, dignitas & autoritas confirmat rei de qua quæritur fidem.*

Article VIII.

Of the qualification of witnesses, and of the challenges which may be made to them.

788. It is not required in witneſſes who are produced to prove a fact, that they ſhould have all the qualifications

requiſite in thoſe who are called to be preſent at the execution of inſtruments of writing, for the ſolemnity of the inſtrument. Women, aliens, monks profeſſed are admitted to teſtify. The reaſon of this difference is, that one has a choice of perſons whom he may call to witneſs the execution and ſolemnity of an inſtrument of writing; whereas he can produce thoſe only, to prove a fact, who have knowledge of it.

The cauſes of challenge which may be made to a witneſs, in order to reject his depoſition, may be reduced to four heads; the want of reaſon, want of reputation, ſuſpicion of partiality, and ſuſpicion of ſubornation.

Of the want of reason.

789. It is not to be doubted that the depoſition of a child and that of an idiot ought to be rejected.

In regard to minors who approach the age of puberty, and who therefore begin to have ſome uſe of reaſon, their depoſitions ought not to be indiſcriminately rejected. But this ought to be left to the prudence of the judge, who may admit the depoſition of ſuch perſons when the circumſtances are well and particularly ſtated, and the facts to which they teſtify are not above their judgment.

Thoſe who contend that the depoſitions of minors under the age of puberty, ſhould be indiſcriminately rejected, ground themſelves on the law 3, §. 5, ff. *de testibus*, which does not admit the depoſition of theſe perſons in the capital accuſation of public violence; but I cannot think this law ought to be conſtrued as a general deciſion and extended to civil ſuits.

Of the want of reputation.

790. The depoſitions of thoſe who have become infamous by ſome judgment, ought to be rejected. The ordinance of 1667, *tit.* 23, *art.* 2, preſuppoſes it.

Not only the loſs of one's reputation, but the mere ſuſpenſion of it, which reſults from a capias iſſued in a criminal ſuit againſt a perſon, ought to cauſe his depoſition to

be rejected. Because in order that a witness may be worthy of credit, it is not sufficient that he should be free from crime, it is requisite that he should be free from all legal suspicion.

It is the same in the case of a summons in a criminal suit, when the crime for which it has issued is susceptible of an infamous punishment.

The ordinance of 1667, above cited, considers the capias, as well as judgment, as a ground of challenge against a witness.

Of the suspicion of partiality.

791. The suspicion of partiality is a good ground of challenge, which will cause the deposition of the witness to be rejected: witnesses, to be worthy of credit, ought to be perfectly disinterested.

It is on this ground that they reject the deposition, 1. of those who have a personal interest in the determination of the cause, although they be not parties to it.

For example. If in consequence of an inchoate proof in writing, I have been admitted to testimonial proof of the sale of a piece of land which I contend you sold to me, the deposition of the lord of the manor from whom it is holden ought to be rejected, because he has an interest in the determination of the cause, on account of the profits he will be entitled to, if it be determined that there has been a sale.

792. II. On the same principle they reject the deposition of those who are related by consanguinity or affinity to one of the parties or both, to the fourth degree in the collateral line inclusively. *Ord.* 1667, *tit.* 23, *art.* 11.

Note, that these relations of a party cannot testify either for or against him. Their situation gives rise to a presumption of friendship or enmity, inconsistent with impartiality. *Sunt apud concordes excitamenta charitatis, inter iratos vero incitamenta odiorum.* This is the reason given in the debates on the ordinance.

It appears by these debates that this article of the ordinance met with great opposition, and was admitted against

the opinion of the firſt preſident and the other magiſtrates of the parliament. In the civil law parents and children only were excluded from teſtifying againſt each other. L. 1. *Cod. de teſt.* All the relations of the collateral line were admitted, except that in criminal caſes, relations, as far as the degree of children of couſins-german, were not compellable to teſtify againſt their relations. L. 4, ff. *d. tit.*

793. III. On the ſame principle they reject moſt commonly the depoſitions of ſervants and domeſtics of either party. I have ſaid, moſt commonly; for the ordinance not having abſolutely denied the admiſſion of theſe depoſitions, as it has thoſe of relations, but having merely required that whenever the witneſs is a ſervant or domeſtic of the party, this ſhould be mentioned in the caption of the depoſition, it gives us to underſtand that it is left to the diſcretion of the judge to regard it as he thinks proper, and to admit or reject the depoſition according to circumſtances.

We call *ſervants*, thoſe whom we have hired to render us all the ſervices which we may command them to render us, although they are employed principally for a certain kind of ſervice.

Thus there may be a ſervant without his being a domeſtic, ſuch as a gardener or a game-keeper, which a gentleman reſiding in town keeps on his eſtate. Such perſons are not properly his domeſtics, ſince they do not dwell with him, nor are ſupplied from his table; but they are his ſervants, ſince he has them on wages, and he may command them, when he is on his eſtate, to render him all the ſervices they are capable of rendering.

In this theſe perſons differ from thoſe with whom we have made a bargain for them to do a certain piece of work for a certain ſum; ſuch are vine-dreſſers. Theſe are not properly our ſervants, and we have no right to command them, nor to exact from them any other thing than the work which they engaged to do: therefore in practice the teſtimony of a vine-dreſſer of the party is admitted.

We call *domestics*, persons who dwell in our house and eat of our bread, whether these persons are at the same time our servants, such as lackeys, coachmen, cooks, waiting-men, stewards, &c., or whether these persons are not properly servants, provided we have however some authority over them, as apprentices, clerks to attorneys, &c.

The depositions of servants or domestics are especially rejected, when they are offered for and at the request of their masters. For this the law 6, ff. *de test.*, is cited: *Idonei non videntur esse testes, quibus imperari potest ut testes fiant.* This law is not received however as entirely applicable. It speaks of slaves and children of a family, who were subject to a power from which they could not withdraw; whereas our servants are free persons.

794. IV. It is on the same ground of a suspicion of partiality that we ought not to receive in a cause the testimony of the counsel or attorney of either of the parties; L. 25, ff *de test.*

Their testimony would be suspected of partiality, if they were witnesses in favor of their client, and it would be indecent to permit them to be witnesses against him.

For the same reason a tutor, a curator who is a party in this quality for his ward, cannot be a witness either for or against him. Officers of a corporation cannot be witnesses for or against it.

But the relations, and even children of these persons who are parties only in their quality of tutors, curators, or officers of a corporation, and likewise their servants and domestics may be witnesses: for these persons are not properly parties, it is the minor, the corporation, that is a party by their intervention.

For the same reason when a corporation is a party, the members of this corporation ought not to be received to give testimony: this testimony would be suspected of partiality, if they were witnesses for their corporation, and it would be indecent to oblige them to be witnesses against it.

CHAPTER III.

Of confession, presumptions and oaths.

SECTION. THE FIRST.

Of confession.

CONFESSION is judicial or extra-judicial.

§ I.

Of judicial confession.

797. The judicial confeſſion is the acknowledgment which the party makes before the judge, being thereto interrogated, and which the judge directs to be recorded.

The confeſſions or acknowledgments which the parties make in the ſeveral ſtages of a ſuit, by their inſtruments of writing or pleas, may alſo paſs for a ſort of judicial confeſſion, when the attorney has authority from his client to make them, and he is preſumed to have ſuch authority as long as he is not diſavowed.

798. The judicial confeſſion made by a party capable of being a party in a ſuit, makes full proof of the fact which is confeſſed, and diſcharges the other from making proof of it. Therefore if a debtor, ſued for a debt, confeſſes to owe the thing or the ſum demanded, the creditor is diſcharged from making proof of the debt, and he may, on this confeſſion, move for judgment againſt the defendant. *Vice versa*, if the creditor who has made out his claim admits in court the payments which the debtor pretends to have made, theſe payments will be allowed and the defendant will be diſcharged from making proof of them.

799. Note, that when I have no other proof than your confeſſion, I cannot divide it. Suppoſe, for example, that I ſue you for two hundred livres which I contend I lent you. If on this demand you have admitted the loan in court, adding that you have repaid me the money, I cannot derive from your confeſſion a proof of the loan, without its making at the ſame time proof of the payment; for

I cannot avail myself of it against you without taking it as it is and entire. *Si quis confessionem adversarii allegat, vel depositionem testis, dictum cum sua quantitate approbare tenetur; Bruneman, ad* L. 28, ff. *de pact.*

800. The proof which results from the confession against him who made it, is not such as that he cannot destroy it by shewing the error which occasioned it; and herein this proof is less than that which results from the presumption *juris & de jure*, (of which we shall treat in the following sections) which excludes all proof of the contrary.

If, for example, I brought a suit against you for two hundred livres which I contended to have lent to your father, of which I produced no other proof than a letter by which your father had entreated me to make him this loan, and in this suit you acknowledged to owe me the money; this confession forms against you a proof of the debt; and whereas before this confession you might have been discharged from my claim without proving any thing, by saying simply that you had no knowledge of the loan, which this letter by me produced does not sufficiently prove; on the contrary, since your confession, I have against you, by your confession, a sufficient proof whereon I may obtain a judgment against you for this sum: unless on your part you bring proof that the loan was not made, and that it was through error that you admitted it. As if, for example, you produced my letter in answer to your father's, by which I said that I could not make him the loan which he requested, and you declared that you had discovered this letter since your confession; the error of your confession, being proved by this letter, destroys this confession and the proof which resulted from it: for as a consent given through error, is not a true consent according to this rule of law, *non videntur qui errant consentire;* L. 116, §. 2, ff. *de R. J.;* so a confession, occasioned by error, is not a true confession: *Non fatetur qui errat;* L. 2, *de confessis.*

Observe that the error of a confession can be proved only by the proof of some fact which did not come to the know-

ledge of him who made it, until after he had made it, as in the inſtance above adduced; but he who has made a confeſſion cannot deſtroy it by alledging that it was an ignorance of law he was in when he made the confeſſion, and which induced him to make it; for it is his own fault not to have informed himſelf before: therefore the law 2, above cited, after having ſaid, *non fatetur qui errat*, adds, *nisi jus ignoravit.*

This diſtinction between error of law and error of fact, will appear by the following example. Suppoſe a minor, of ſufficient age to make a will, had bequeathed a conſiderable ſum to his preceptor. The heir, being ſued, acknowledged to owe to this preceptor the ſum expreſſed in the will. If afterwards the heir diſcovered a codicil revoking the legacy, his confeſſion, occaſioned by his ignorance of the codicil, which is an error of fact, will be deſtroyed: but if the legacy had not been revoked, and the heir alledged only that it was through error that he acknowledged to owe the ſum expreſſed in the will, becauſe he was then ignorant of the law which forbids minors to bequeath to their preceptors; this error which he alledges being an error of law, he will not be allowed to avail himſelf of it, and the proof reſulting from his confeſſion will remain.

It remains for us to obſerve that, when a defendant who has confeſſed to owe the ſum which is demanded from him wiſhes to prove the error of his confeſſion, if the proof of the facts, by which he would prove this error, require a long diſcuſſion, the plaintiff may obtain a proviſional judgment againſt him for the ſum which he has confeſſed to owe: for until he makes the proof of theſe facts, the proof which reſults from his confeſſion remains, and ought to entitle the plaintiff to proviſional judgment.

§. II.

Of extrajudicial confession.

801. Extrajudicial confeſſion is that which is made not in any judicial proceedings.

We do not intend to ſpeak of the confeſſion which the parties make of their obligations by the inſtrument of writing from which they ariſe, or by inſtruments of writing to recogniſe and confirm them, which are drawn expreſsly for this purpoſe. We have treated of the proof which reſults from theſe inſtruments, *ſupra, chap.* 1.

The confeſſions of the debt, of which we ſpeak here, are thoſe which the debtor makes, in a converſation or by letter, or which are accidentally on ſome inſtrument of writing which was not expreſsly made for this purpoſe. Dumoulin diſtinguiſhes between thoſe which my debtor has made to me, and thoſe which he has made to a third perſon not in my preſence.

When it is to me that the debtor has confeſſed the debt, and his confeſſion expreſſed the cauſe of the debt, this confeſſion makes a complete proof of the debt; but if it was made in a vague manner, and without expreſſing the cauſe, it forms, according to this author, only an imperfect proof, which muſt be completed by the ſuplementary oath which the judge ought to require me to make.

When the confeſſion was made to one who repreſented me, as to my tutor, curator, attorney &c, it is the ſame as if made to me.

When it has been made to a third perſon not in my preſence, it makes only an imperfect proof, which ought to be completed by the ſupplementary oath. Such are the diſtinctions made by Dumoulin *ad.* L. 3, *Cod. de reb. cred.*

Theſe principles of Dumoulin appear to me to require a further diſtinction. When my debtor who has acknowledged, out of court, to owe me a certain ſum, denies, on being ſued, that he contracted towards me the debt of this ſum, the confeſſion which he has before made, convicts him of a falſehood, and eſtabliſhes the debt for which I brought the ſuit, without his being allowed afterwards to alledge, except with proof, that he has paid this ſum, of which he firſt denied to have been the debtor.

But if my debtor, whom I have ſued, had confeſſed that he did owe me this ſum, but maintains that ſince he made this confeſſion he has paid it to me; whether his confeſſion was made to a third perſon or to myſelf, whether in a converſation or by letter, or in ſome inſtrument of writing which was not made to afford me a proof of the debt, it would not be any proof that the ſum is ſtill due me at this day.

In regard to what is ſaid by Dumoulin, that the confeſſion made to a third perſon makes only an imperfect proof of the debt, it muſt be obſerved that there are certain caſes in which it ought to make a complete proof.

Guthierez, *de contr. jura*, *q.* 54, *n.* 5, adduces as an example the caſe in which the debtor, in making this acknowledgment to third perſons, ſays he does it in diſcharge of his conſcience. For example. If a ſick perſon calls in two perſons to whom, in the apprehenſion of his death, he declares that he owes me the ſum of one hundred livres which I have lent him without a note; ſuch a confeſſion, although made to third perſons, appears to me to make a complete proof of the debt.

When my debtor, in an inventory taken on the diſſolution of a partnerſhip, includes in the liſt of debts due by the partnerſhip, the debt for which he is bound towards me, this conſeſſion, although made not in my preſence, ought alſo, it appears to me, to be a complete proof of the debt.

As the extrajudicial confeſſion which the debtor has made of the debt in the preſence and on the requeſt of the creditor, makes a complete proof of the debt; *a fortiori*, the extra-judicial confeſſion of the payment made by the creditor in the preſence and on the requeſt of the debtor, makes an entire proof of the payment: for the diſcharge being to be favored, it ought to be more eaſy to be proved than the obligation. It is the ſame if this acknowledgment was made by the creditor in the preſence of ſome one who had requeſted it on the part of the debtor; for it is as if

he had made it in the preſence of the debtor himſelf; *Guthierez, ibid.*

There are indeed ſome authors cited by Guthierez, who think that the extra-judicial confeſſion of the payment made by the creditor, although in the preſence of the debtor, makes a complete proof of the payment; but Guthierez thinks that it makes only an imperfect proof. This ought to depend much on circumſtances.

802. He who wiſhes to eſtabliſh his demand by the extra-judicial confeſſion of the debt, or his defence by the confeſſion which he pretends the plaintiff has made of the payment or releaſe of the debt, ought to prove this confeſſion. It may be proved either by ſome writing or by witneſſes. If however the fact which I intend to prove by your extrajudicial confeſſion, was a fact whereof teſtimonial proof was not admiſſible, I could not be admitted to teſtimonial proof of your confeſſion. For example. If I demand of you the reſtitution of a certain book of a value exceeding one hundred livres, which I claim to have lent you, and I advance that you acknowleged the loan before witneſſes, I ſhall not be admitted to prove this confeſſion by witneſſes; becauſe it would be to admit me indirectly to teſtimonial proof of the loan of a thing exceeding one hundred livres, which the ordinance forbids.

803. In order that the confeſſion may be a proof againſt him who has made it, it is neceſſary that he who made it ſhould be capable of binding himſelf; the confeſſion of a feme covert not authoriſed by her huſband, or of a minor, would not be proof.

804. The confeſſion is proof not only againſt him who has made it, but alſo againſt his heirs: yet if one had acknowledged to owe to a perſon to whom the law forbids one to give, this confeſſion would not be proof of the debt againſt them, unleſs the cauſes of the debt were well ſtated and explained; *Qui non potest donare, non potest confiteri.*

805. An implied confeſſion ought to have the ſame effect as an expreſs confeſſion. Therefore the payment which

a perſon makes, being an implied confeſſion on his part that he owed the thing which he has paid, there reſults from this payment a proof againſt him, that the thing which he has paid, was really due.

If therefore he wiſhes to claim back this thing, as having paid it unduly, he who has received it, is not obliged to prove that it was really due; he has a ſufficient proof of it, reſulting from the implied confeſſion included in the payment which has been made to him; it is incumbent on him who made the payment, to prove the error. This is the deciſion of the law 25, ff. *de probat.*

Yet Paul, from whom this law is taken, adduces two exceptions. The firſt is, that if he to whom the thing has been paid, being ſued to reſtore it, firſt denied the payment which was made to him, and this payment has been afterwards proved, he ought to be obliged to prove that the thing which has been paid to him, was really due. The reaſon of this exception is that the preſumption againſt the truth of the debt, reſulting from the falſe denial of the payment which was made to him, deſtroys the preſumption of the truth of this debt, which reſulted from the payment.

Paul adduces a ſecond exception in favor of minors, women, ſoldiers, &c. As theſe perſons are eaſily deceived, he thinks it proper that he who has received from them ſomething in payment, ſhould be bound to prove that the thing was really due. This exception it appears to me ought not to be admitted indiſcriminately; it ought to depend much on circumſtances.

§. II.

Of presumptions.

806. A preſumption may be defined a judgment which one makes or which the law makes upon the truth of a thing, by a conſequence drawn from another thing. Theſe conſequences are founded on what happens commonly and in the order of things: *Præsumptio ex eo quod plerumque fit. Cujac. in parat. ad tit. cod. de probat. & præs.*

For example, the law presumes that a debt has been paid, when the creditor has returned the debtor his note; because the creditor does not commonly give up his note to the debtor till after the payment of the debt.

Alciat says that this term *presumptio*, presumption, is derived from *præ* and *sumere*; because *sumit pro vero, habet pro vero*, it causes a thing to be holden for true; *PRÆ, id est antequam aliunde probetur*, without its being necessary to make other proof.

Presumption differs from proof properly so called: this is evidence of a thing directly and of itself; presumption is evidence of it by a consequence derived from another thing. This will be illustrated by examples. The proof which is made by an instrument of writing expressing the receipt of a debt, is a *literal proof* of the payment of this debt: the proof which is made by the depositions of witnesses who saw the creditor receive from his debtor the money which was due him, is an *oral proof*; for the receipt and the depositions of the witnesses are evidence of this payment directly and of themselves. But the proof resulting from the receipts of the three last years' rent, that the rent of the preceding years is paid, is a presumption; because it is not directly and of themselves that these receipts are proof, but by a consequence which the law deduces from the payment of the three last years', that the rent of the preceding years has been paid, which consequence is grounded on this reason that it is common to pay the old rent before the new.

There are, on the subject of obligations, different kinds of presumptions. There are some which are established by law and are called *legal presumptions*; and others which are not established by any law, which are called *simple presumptions*. Among legal presumptions there are some which are presumptions *juris & de jure*; others which are simply *legal presumptions*, *presumptiones juris*.

§. I.

Of presumptions juris & de jure.

807. Presumptions *juris & de jure*, are those which are such proof as excludes all proof to the contrary. Alciat defines the presumptions *juris & de jure*, in this manner: *est dispositio legis aliquid præsumentis, & super præsumpto tanquam sibi comperto statuentis.* It is, says Menoch, *Tr. de præs. lib.* 1, 9, 3, called *præsumptio* JURIS, because *a lege introducta;* ET DE JURE, because *super tali præsumptione lex inducit firmum jus, & habet eam pro veritate.*

808. These presumptions *juris & de jure* are stronger than literal or oral proof, or even confession.

Literal proof, as well as oral, may be destroyed by contrary proof. It does not exclude him against whom it militates, from being heard against it and making, if he can, proof of the contrary.

For example. If the plaintiff, who pretends to be my creditor for the sum of one hundred livres, which he pretends to have lent me, produces an obligation executed before a notary, by which I acknowledge the loan, the literal proof which results from this obligation, may be destroyed by contrary proof, and it does not exclude me from making, if I can, proof of the contrary; *puta*, by bringing a writing by which the plaintiff acknowledged that I did not receive the money mentioned in the obligation.

It is the same with regard to the confession, although made *in jure*. We have seen in the preceding section that the proof that results from it may be destroyed by the proof which he who made it may introduce, that it was occasioned by error.

On the contrary, the presumptions *juris & de jure*, cannot be destroyed, and the party against whom they militate is not permitted to prove the contrary, as we shall see in the following sections.

The principal kind of presumptions *juris & de jure*, is that which arises from the authority of the thing judged,

rei judicatæ; as it deſerves to be treated minutely, we will treat of it *ex profeſſo* in the next ſection.

The preſumption that reſults from the litis-deciſory oath is alſo a kind of preſumption *juris & de jure*, of which we ſhall treat in the fourth ſection, in treating of oaths.

§. II.

Of legal preſumptions.

809. Legal preſumptions are alſo eſtabliſhed on ſome law, or by deduction from ſome law or text of law, and are therefore called *præſumptiones juris.* They have the ſame ſtrength as proof, and excuſe the perſon in whoſe favor they operate, from adducing any to eſtabliſh their claim or defence. But, and it is in this that they differ from preſumptions *juris & de jure*, they do not exclude the party againſt whom they operate, from being admitted to make proof of the contrary; and if the party ſucceeds in making this proof, the preſumption will be deſtroyed.

810. When two perſons of the ſame province, the cuſtom of which admits the community of property between huſband and wife, contract marriage in it; there is a legal preſumption that they have agreed there ſhould be between them ſuch a community of property as is cuſtomary in that province. The wife, who afterwards demands from the heirs of her huſband her ſhare of the property which he has acquired, need not make any proof of ſuch an agreement.

The preſumption is eſtabliſhed by the diſpoſition of the cuſtoms, which ſay that *huſband and wife are one and in a community, &c.;* for this is as if it were ſaid that it is preſumed that they agreed to be one and in community, &c. It is grounded on this that it is common in ſuch a province for perſons who intermarry to agree to have a community of property. Hence the law has drawn this conſequence, that the parties who intermarry, without expreſſing their intention, ought to be preſumed to have agreed to a community. *Præsumptio enim ab eo quod plerumque fit.* This pre-

ſumption not being *juris & de jure*, it diſpenſes indeed with proof of any agreement for a community, but it does not exclude the proof of the contrary, which may be made by producing a marriage ſettlement with a clauſe of excluſion of the community.

811. It is likewiſe a legal preſumption, that in our city of Orleans the walls are common between neighbours to the height of ſeven feet above the ground. *Custom of Orleans, art.* 234.

He therefore who would avail himſelf hereof, cannot be prevented by his neighbour, and he is not obliged to ſhew any proof of his right, which is ſufficiently founded upon the preſumption eſtabliſhed by the cuſtom; but this preſumption may be deſtroyed by proof which the neighbour may make by his titles, that the wall belonged to himſelf alone.

812. The law 3, *cod. de apoch. publ.*, contains alſo a legal preſumption. According to this law, the receipts of the taxes for three ſucceſſive years, form a preſumption of the payment of thoſe of the preceding years. Although this law was made only in regard to taxes, the deciſion has been extended to arrearages of rents, annuities, and other like annual debts: *nam ubi eadem ratio, idem jus statuendum est.* This deciſion is founded upon this, that as it is common to demand the old debts before the new, the payment of the late arrearages ſeveral times repeated, ought to make a preſumption of the payment of the old. It is alſo founded upon this, that we ought to aſſiſt debtors, and not oblige them to keep their receipts two long, and in too great a number, for fear that they might ſome of them be loſt. *Perez, ad d. tit. cod.*

There are ſome who would even ſay that the receipt for a ſingle year ought to make a preſumption of payment for all the preceding years; but this opinion does not appear to be well grounded.

This preſumption does not apply except when the arrearages of the preceding years are due to the ſame perſon

who has given the receipts for the three laſt, and by the ſame perſon to whom they have been given. It has alſo other exceptions. See what we have ſaid in our treatiſe on the contract of hire, *part* 3, *ch.* 1, *art* 3. This preſumption, not being *juris & de jure*, does not exclude the creditor againſt whom it operates from proving that the old arrearages are due him, and that ſince the receipts of the three laſt years the debtor has acknowleged theſe old arrearages.

813. The law 2, §. 1, ff. *de pact.*, furniſhes us alſo with an example of a legal preſumption. This law preſumes that a debt is diſcharged, when the creditor has returned the debtor his note. It is founded upon this that it is not common or probable that a creditor ſhould return the note before it is diſcharged. This preſumption, not being *juris & de jure*, does not exclude the creditor from proving that the debt has not been paid. We have treated of this preſumption *ſupra*, n. 372.

The preſumption of payment which reſults from this, that the note of the debtor is cancelled, *chirographum cancellatum*, is ſimilar to the foregoing: it is a legal preſumption; the law 24 ff. *de prob.*, ſuppoſes it. It is founded upon this, that it is a common ſign of payment that a note is found to be cancelled; it excuſes the debtor from bringing other proof of the payment. But this preſumption may be deſtroyed by a proof which the creditor might make that it was by miſtake that the note was cancelled and that it has not been really diſcharged; L. 24, ff. *de probat.*; *puta*, if the creditor ſhould produce a letter by which the debtor had written to him in theſe terms; "I return you the note of "my deceaſed father, which you have ſent me cancelled, "depending upon the promiſe which I had made you to "diſcharge it. I am ſorry I have not been able to keep "it, &c.

814. The preſumption of the payment or of the releaſe of profits, which reſults from an admiſſion to homage made without reſervation, is another kind of legal preſumption:

it is eſtabliſhed upon the article 65 of our cuſtom of Orleans, and is founded upon this, that it is common that the lord ſhould make this reſervation when he has not been paid the profits and does not intend to releaſe them. This preſumption excuſes the tenant from making other proof of the payment of the profits, and from producing any receipt; but it does not exclude the creditor from proving that the profits are due to him; *puta*, by letters in which the tenant had acknowleged them to be due.

We might alſo adduce ſeveral other examples; thoſe we have already adduced are ſufficient.

§. III.

Of the presumptions which are not established by law.

815. There are ſome of theſe preſumptions which, without being eſtabliſhed by any law, are ſufficiently ſtrong to be the ſame proof as legal preſumptions; ſaving to the party againſt whom they operate, the right to prove the contrary. A common example. When a party diſavows the attorney who has acted for him in a ſuit, if the attorney who is diſavowed has the writ in his poſſeſſion, and the officer who ſerved it is not diſavowed, this writ which he has in his poſſeſſion, forms a preſumption in favor of the attorney, which is equivalent to a proof of authority.

The preſumption is ſtill ſtronger if the attorney has alſo the titles of the party upon which the ſuit is founded; and the preſumption which reſults from theſe titles alſo prevents the party from being able to diſavow the officer. Likewiſe when the attorney of the defendant holds the titles of his client which have ſerved for the defence of the cauſe, theſe titles furniſh a proof of authority, and that he has been employed.

Theſe preſumptions excuſe indeed the attorney from bringing other proof of an authority; but they do not exclude the perſon diſavowing, from making, if he can, proof that he did not employ the attorney. As if he ſhould produce a letter of this attorney in theſe terms, "I have receiv-

"ed the titles which you have ſent me in order to take the "advice of counſel; I ſhall do nothing without your orders;" ſuch a letter, which eſtabliſhes that the titles were only ſent to him for the purpoſe of obtaining advice, and by which he ſubmitted to wait for orders to bring ſuit, deſtroys the preſumption of a power of attorney, which reſults from his holding the titles.

Obſerve in regard to officers, that the title in the poſſeſſion of an officer makes indeed a preſumption of his authority for the ſervice of a writ which he has made in conſequence of this title, or for a ſimple demand which he has made in virtue of it; but it is very dangerous to eſtabliſh from this a preſumption in favor of the ſeiſures, executions and ſales which he has made: for we ſee it happen every day, that officers, under color of a title which is delivered them to make a demand, make, contrary to the will of the creditor, ſeiſures which ruin the debtor and ſometimes the creditor, by the coſts.

The other preſumptions which we call ſimple, do not form ſingly and by themſelves a proof; they ſerve only to confirm and complete the proof which reſults otherwiſe.

816. Sometimes the concurrence of ſeveral of theſe preſumptions united together is equivalent to a proof. Papinian, in the law 26, ff. *de probat.*, adduces an example of this. A ſiſter was charged towards her brother with the reſtitution of a truſt. After the death of the brother it was a queſtion whether this truſt was ſtill due by the ſiſter to the eſtate of the brother. Papinian decides that we ought to preſume that the brother had releaſed it to his ſiſter; and this preſumption of the releaſe he derives from three circumſtances, I. the relation of brother and ſiſter; II. that the brother had lived a long time without demanding the truſt: III. that many accounts had been ſettled between the brother and ſiſter upon the reſpective affairs which they had together, in none of which was there any mention of this. Each of theſe circumſtances, taken ſeparately, would form only a ſimple preſumption, inſufficient to induce a deci-

ſion that the deceaſed had releaſed the debt; but their concurrence has appeared to Papinian to form a ſufficient proof of this releaſe.

SECTION THE THIRD.

Of the authority of the thing judged, rei judicatæ.*

The particular kind of preſumption *juris & de jure*, which reſults from the authority of the thing judged, has appeared to us to require to be treated of particularly, in this ſection.

We ſhall here ſee, I. what judgments have the authority of the thing judged; II. what judgments are null, and cannot conſequently have this authority; III. what is the authority of the thing judged: IV. in regard to what things it applies; and, V. between what perſons.

ARTICLE THE FIRST.

What judgments have the authority of the thing judged.

I. In order that a judgment may have the authority of the *thing judged*, and alſo in order that it may have the name, it is neceſſary that it ſhould be a definitive judgment, which contains either a condemnation or a diſcharge from the ſuit. *RES JUDICATA dicitur quæ finem controverſiarum pronuntiatione judicis accipit, quod vel condemnatione vel abſolutione contingit*; L. 1. ff. *de re jud.*

A judgment which contains a proviſional condemnation cannot therefore have either the name or the authority of the *thing judged*; for although it gives the party, who has obtained it, the right to conſtrain the party condemned, to pay proviſionally the ſum or the things expreſſed in the judgment, it does not put an end to the ſuit, and does not form a preſumption *juris & de jure*, that this ſum or

* *All this ſection has been added in this new edition; therefore we have diſcontinued the order of the numbers, and have put particular numbers here, in order that, in what follows this ſection, the numbers which are in the firſt edition may correſpond in this.*

theſe things are due; ſince the party condemned, having proviſionally ſatisfied the judgment, is received afterwards to prove that they are not due, and may conſequently procure the judgment to be revoked. *A fortiori* the judgments or interlocutory orders which do not contain either a condemnation or a diſcharge from the ſuit, cannot have the authority of the *thing judged*. *Non vox omnis judicis, judicati continet autoritatem*; L. 1, *Cod. de ſent. & interloc.*

2. The ordinance of 1667, *tit.* 27, *art.* 5, adduces three caſes in which definitive judgments have the authority of the thing judged. It is there ſaid: "The ſentences "and judgments which ought to have the force of the thing "judged, are thoſe rendered in the laſt reſort, and from "which there is no appeal, or of which the appeal is not "receivable, either becauſe the parties have formally ac-"quieſced, or have not appealed in time, or the appeal "has been declared to be loſt."

We ſhall treat ſeparately of theſe three caſes.

§. I.

FIRST CASE. Of judgments rendered in the laſt reſort, and of thoſe from which there is no appeal.

3. The ordinance unites in one article, with judgments rendered in the laſt reſort, thoſe from which no appeal is yet taken; becauſe while there is yet no appeal, they have, like thoſe rendered in the laſt reſort, in a manner, an authority of the *thing judged*, which gives to the party in whoſe favor they were given, the right to purſue them to execution, and forms a kind of preſumption *juris & de jure*, which excludes the party againſt whom they were given, from pleading any thing againſt them, while there is no appeal; but this authority, and the preſumption which reſults therefrom, are only momentary, and are deſtroyed as ſoon as an appeal is taken.

This applies, even when the judgment ſhould be of the number of thoſe which are to be proviſionally executed notwithſtanding the appeal; for this proviſional execution

gives to these judgments, pending the appeal, only the effect of provisional judgments, which, as we have seen *supra*, have not the authority of the *thing judged*.

4. In regard to judgments rendered in the last resort, such as those of supreme courts and in certain cases those of the presidial and consular judges, when they are definitive, they have the authority of the *thing judged*, stable and perpetual.

When the judgment in the last resort has been rendered on a contestation, it has this authority, as soon as it is rendered; but when it has been rendered by default, unless it was in the course of the docket, the party making default, against whom it has been rendered, is received to move that it may be set aside, within eight days from the day notice of the judgment is given to his attorney, or if he had appointed no attorney, from the day notice is given to himself in person or at his house. This motion destroys the effect of the judgment. Therefore it is only after the party making default has let the eighth day pass without making this motion, that the judgment by default acquires the authority of the *thing judged*, stable and perpetual.

5. Judgments of supreme courts and of those in the last resort, can never be attacked in the ordinary way of appeal, but the former may be, in certain cases, by the extraordinary method of *civil petition*. Presidial judgments rendered in the last resort may likewise be attacked, in the same cases, by the method of a *petition in opposition*, which is also an extraordinary way and which differs from the civil petition only in this that it does not require the same formalities which are requisite for the civil petition, such as those to deposit the fine, expressed in the article 16 of the last title of the ordinance of 1667, and to annex to the petition a consultation of senior lawyers, according to the article 13.

These petitions not arresting the execution of the judgments of supreme courts and judgments in the last resort, (*art.* 13,) and the party not being received to avail himself

against the judgment, of other pleas than those which are the ground of the civil petition, without being heard on any plea to the merits; *Art.* 31, 37., it follows that judgments which are thus situated, for which there is room for a civil petition, until they are reversed by this method, have, not the less, an authority of the thing judged, but which is not stable or perpetual; since it may be destroyed by the reversal of the judgment: they have this authority only when the party has suffered the time to elapse within which he might avail himself of this method, or when he has failed in attempting to do so; for in this case he is no longer receivable to make the petition. *Art.* 41.

6. The ordinance adduces several instances in which there is room for the civil petition; it distinguishes in this respect between persons of age and minors, between individuals and the church.

The causes for which individuals, although of age, are admitted to the civil petition, are related in the article 34, title 35. It is there said, *no other causes for the civil petition by persons of age, shall be admitted, than,* I. *personal fraud.*

Which is to say, when the party in whose favor the judgment has been rendered, has employed fraud and artifice to obtain it, *puta,* by suppressing material papers or using such as are forged, as will be said hereafter.

II. *If the forms by us ordained have not been observed;* this defect renders the judgment null.

III. *If it has been pronounced upon things not demanded or not contested, and if more has been adjudged than was demanded;* this is another defect which renders the judgment null and of which we shall speak in the following article.

IV. *If it has been omitted to pronounce upon any point in issue.*

V. *If there has been a contrariety of judgments in supreme courts or those of the last resort, between the same parties, on the same pleas and in the same courts or jurisdictions; saving, in case of a contrariety in different courts or jurisdictions, an application for relief to the grand council.*

VI. *If in the same judgment there are contradictory dispositions.*

VII. *If the judgment has been given upon forged papers.*

Obſerve that it does not ſuffice, to reſcind a judgment by means of the civil petition, that the party in whoſe favor it has been rendered, had produced forged papers; it is neceſſary that it ſhould appear that it was upon the ground of theſe papers that the judgment was rendered: *Causa judicati in irritum non devocatur; nisi probare poteris eum qui judicaverit, secutum ejus instrumenti fidem quod falsum esse constiterit, adversus te pronuntiasse;* L. 3, *Cod. si ex fals. instr.*

It is neceſſary alſo that theſe papers ſhould not have been already attacked for forgery in the ſuit in which the judgment was rendered; for in this caſe the queſtion upon the genuineneſs of the papers would be a queſtion which had been already determined by this judgment, and which conſequently could not be renewed, as has been well obſerved by M. Jouſſe, in his commentary upon this article.

Finally, although the party, who would ſeek relief by civil petition, had through error acknowleged the genuineneſs of the paper which he pretends he has ſince diſcovered to be forged, he ought not the leſs to be admitted to attack this paper as forged, and the judgment which has been rendered upon it. L. 11, ff. *de except.*

VIII. *Or upon offers or admissions which have been disavowed, and the disavowal judged valid.*

If my attorney has made offers or admiſſions upon which I have been condemned, I may, if I pretend not to have given power to my attorney to make theſe offers, ſeek relief by civil petition againſt the judgment: but in order to be admitted to this, it is neceſſary that I ſhould diſavow my attorney, and that I ſhould procure my diſavowal to be declared valid againſt him.

IX. *Or if there have been material papers lately recovered, and retained by the act of the party.*

This is an example of perſonal fraud in the party in whoſe favor the judgment has been rendered, which gives room for the civil petition, as has been ſaid *supra*.

The recovery of material papers is not alone a ſufficient cauſe for the civil petition, and to reſcind the judgment, as we ſhall ſee *infra*, *art.* 8: it is the ſuppreſſion of theſe papers made through the fraud of the party, which gives room for it.

7. When it is againſt minors, againſt the church or againſt corporations, that the judgment of a ſupreme court has been rendered, beſides the caſes that have been juſt mentioned, there is likewiſe another caſe in which there is ground for the civil petition, to wit, *if they were not defended, or were not validly defended*; art. 35.

Theſe terms ought to be interpreted by the original article 36, as firſt introduced, which is found in the debates on the ordinance, page 463. It is there ſaid, "The above "applies to eccleſiaſtics, to corporations and minors. And "beſides, we conſider it, in regard to them, as a further "ground for the civil petition, that they have not been defend-"ed; that is to ſay, that the judgments of ſupreme courts and "thoſe of the laſt reſort have been given by default; that they "have not been validly defended, in caſe the principal pleas "were omitted, although theſe judgments were given upon "a plea; ſo however that it appears that they have not been "defended or not validly defended, and that the omiſſion of "their principal pleas gave room for the judgment which "was rendered."

It appears by the debates on the ordinance, that the original article was approved of. Hence it follows that it was only *brevitatis & compendii studio* that it was omitted, and becauſe it was thought that all it contained was ſufficiently included in the generality of the terms, *if they have not been defended or not validly defended.*

Obſerve that the church is always preſumed not to have been ſufficiently defended, when the affair has not been

communicated to the king's law officers: the article 34 makes this a ground for the civil petition.

Obſerve alſo that the church has theſe rights only when the matter in queſtion relates to the principal of its eſtate: *case decided 27th March, 1703, reported by Augeard, vol. 3.* When the matter relates only to its revenues, it is rather the cauſe of the incumbent than that of the church.

8. The party againſt whom the judgment has been rendered, when it is in one of the caſes above mentioned, ought to ſeek relief by civil petition, before the court which rendered the judgment, within ſix months from the time notice of the judgment is given him, after his coming of age; *art.* 5.

If the party dies within the ſaid time of ſix months, his heirs have a further time of ſix months from the day of a new notice which ſhall be given to them; and if they are minors, the time will run only from their coming of age.

The church, corporations, lay and eccleſiaſtic, and individuals abſent from the kingdom on public buſineſs, have a year from the time notice is given to them of the judgment; *art.* 7.

If the incumbent dies during the year, the ſucceſſor otherwiſe than by reſignation, has a further time of a year from the day of a new notice of the judgment, which muſt be given to him; *art.* 9. In regard to the perſon in whoſe favor the reſignation is made, he has, for his civil petition upon the judgment rendered againſt the perſon reſigning, only the time which remained to the latter; it is not neceſſary to give him a new notice: he is preſumed to have been inſtructed by the perſon reſigning.

9. When one ſeeks relief on account of the judgment being rendered upon forged papers, or on account of papers being newly diſcovered, the time of ſix months or of a year, runs only from the diſcovery, *provided*, ſays the ordinance, *art.* 12, *there be proof in writing, and not otherwiſe.*

It does not ſuffice me then, in order to be admitted to

my civil petition, after the common time of ſix months, to ſay that I did not diſcover the paper, or that the paper was forged, till lately; it is neceſſary that I ſhould have a proof in writing of the time of the diſcovery.

For example. If, after ſeveral years, the party in whoſe favor the judgment has been rendered againſt me, dies, and it appears by the inventory made after his death, of his papers, that the material paper in the ſuit, which had been ſuppreſſed, was found among his papers; this inventory is a proof in writing that the diſcovery of this paper was made at the time of the inventory.

Likewiſe if the party in whoſe favor the judgment has been rendered againſt me upon a forged paper, produces, after ſeveral years, in another ſuit, againſt another perſon, the ſame paper, and in the courſe of this ſuit it be attacked as forged, the judgment which ſhould declare it forged, will prove the time when it was diſcovered to be forged.

10. The cauſes for which one may obtain relief by petition againſt the preſidial judgments rendered in the laſt reſort, are the ſame with thoſe for which one may have relief by civil petition againſt judgments of ſupreme courts. In regard to the time in which this relief muſt be applied for, there is no other difference except that the time of ſeeking it againſt judgments of ſupreme courts, is ſix months for individuals, and a year for the church, corporations, and perſons abſent *rei publicæ causa*; that of ſeeking relief againſt preſidial judgments is only three months for individuals, and ſix months for the church and ſuch abſent perſons.

§. II.

Second case. Of the judgments from which an appeal is no longer receivable.

11. The ordinance adduces in the ſecond place, among the judgments which have the force of the *thing judged*, and which conſequently form the preſumption *juris & de jure*, of which we are treating, thoſe from which the appeal is no longer receivable.

It adduces two cauſes for which it is no longer receivable. The firſt is when the parties againſt whom the judgments have been rendered, have *formally acquieſced therein.*

The ordinance by this term *formally* does not intend it ſhould be neceſſary that the party, in order to be excluded from his appeal, ſhould have acquieſced in the judgment in expreſs terms, and have executed an inſtrument of acquieſcence; it only intended to ſay that his acquieſcence ſhould not be equivocal. Therefore if, for the payment of the ſum to which he has been condemned, he has requeſted a delay, whether at the time of the judgment, or ſince, it is not to be doubted that he would no longer be received to appeal; the requeſting of time being an equivocal proof of his acquieſcence in the judgment: *ad ſolutionem dilationem petentem acquievisse ſententiæ manifeſtæ probatur;* L. *Cod. de re judic. A fortiori* ought he to be preſumed to have acquieſced when he has made a partial payment, whether of the ſum expreſſed in the judgment or of the coſts to which he has been condemned, except in the caſe in which the judgment is to be proviſionally executed, he has paid it only from conſtraint, proteſting that he ſo paid it without prejudice to the appeal by him taken or to be taken.

When the party who has acquieſced in the judgment, is entitled to relief againſt his acquieſcence, whether on account of minority, or of fraud, or any other cauſe, the authority of the thing judged, which the judgment had acquired by his acquieſcence therein, is not ſtable and perpetual; it will be deſtroyed when the party ſhall have been relieved againſt his acquieſcence.

12. The ſecond cauſe for which the appeal is no longer receivable, is when the party againſt whom the judgment has been rendered, has let the time paſs in which the appeal ought to have been taken.

The principles of our law are indeed different, as to the time, from thoſe of the civil law. According to the civil law, the party who thought himſelf injured by the judg-

ment, could, the same day that it was rendered, appeal from it *vica voce APUD ACTA*, that is to say, in the clerk's office or at the bar. *Si apud acta quis appellaverit, satis erit si dicat, APPELLO;* L. 2, ff. *de appell.*

The appeal being a mode authorised by the laws, the Roman judges were not offended that the party who refused to acquiesce in their judgments, should appeal therefrom in their presence, provided it was done in a respectful manner, without any injurious reflections upon the judge or the judgment. L. 3, ff. *de appell.*

When the party did not appeal on the day the judgment was rendered, the appeal was to be taken by a petition which the appellant presented to the judge who gave the judgment. It was necessary that this petition should contain the names of the appellant and of the appellee, the judgment appealed from, and the objections against this judgment. It prayed that the judge would please to grant the writ, called *apostoli*, by which he sent up the case to the judge of appeals. The party had for this appeal only two days after the judgment, when he was party in his own name, or three days, when he was party only in the quality of attorney, tutor, curator or administrator. L. 3, §. 5, ff. *de opp.*; L. 1, §. 11, 12, 13, ff. *quand. app.*

These days were *effective*; that is to say, they were not counted when the judge did not hold his court; *d.* L. 1, §. 7, §. 9.

Justinian, in his novel 23, *ch.* 1, has enlarged this time; he grants for the appeal a delay of ten days, from the day of pronouncing the judgment.

These principles of the civil law, although indeed opposed to ours, appear very wise and very proper to preserve, by restraining suits, the tranquillity of the citizens. The king of Prussia has adopted them in his code; he grants, for the appeal from judgments, the delay only of ten days, expressed in the novel. The party injured by a judgment suffers no prejudice from this short delay: from the

time the cauſe was brought before the firſt judge, this party could have foreſeen that he might loſe his cauſe; and during all the while the ſuit continued, he has had time to deliberate upon the part which he might take in caſe he ſhould be caſt.

13. According to the principles of our law, the party who thinks himſelf injured by a judgment, when he has done no act of acquieſcence in this judgment, and has not been ſummoned to take his appeal, has the time of ten years entire for his appeal, which time begins to run only from the day notice is given of the judgment. *Ordinance* 1667, *tit.* 27, *art.* 17.

Double time is granted, that is to ſay twenty years, to the church, to hoſpitals, colleges, univerſities, lazarettos, to take an appeal from the judgments which they pretend are injurious to their eſtates; and this time runs likewiſe from the day notice is given of the judgment; *ibid.*

However long theſe delays may be, I have heard lawyers in practice ſay that this diſpoſition of the ordinance was not always obſerved in the parliament of Paris, and that they there ſuſtained appeals after the time of theſe delays had expired.

The party in whoſe favor the judgment has been rendered, may abridge the delays by making a legal ſummons to the party againſt whom the judgment has been rendered, to take his appeal if he thinks proper; but this ſummons can only be made at the end of three years from the day notice is given of the judgment, if the judgment has been rendered againſt individuals, and at the end of ſix years, if againſt the church, hoſpitals, colleges, univerſities, lazarettos, on account of their eſtates. *Ordinance* 1667, *d. tit. art.* 12.

The effect of this ſummons is, that the party to whom it has been made, has for his appeal no more than ſix months from the day of the ſummons; *art.* 12.

If before the expiration of theſe delays of three years, of ſix years or of ſix months, the party againſt whom the

judgment has been rendered dies, or when he is an incumbent, if he reſigns his benefice, his heir or general legatee or undiſputed ſucceſſor to the benefice, muſt have for his appeal a further delay of a year, beſides the whole time of delay which his predeceſſor had, and it is neceſſary at the end of this new delay of one year to make a ſummons to him, even when one had already been made to the deceaſed or to the predeceſſor; and from the day of this ſummons the heir or the ſucceſſor would have no more than ſix months to be admitted to take his appeal; *art.* 12, 13, 14. Theſe delays do not run againſt minors; *art.* 16: but they run againſt perſons abſent from the kingdom, even in the ſervice of the king.

§. III.

Third case. Of judgments, the appeal from which has been declared to be loſt.

14. The ordinance adduces in the third place, among the judgments which have the force of the *thing judged*, thoſe from which the appeal has been declared to be loſt.

The appeal is loſt when it has failed by a diſcontinuance of the proceedings for three years, and a judgment has intervened declaring the diſcontinuance.

This judgment, which declares the diſcontinuance of the appeal, carries a confirmation of the judgment appealed from, and gives it the force of the *thing judged*; the appellant who has ſuffered his appeal to be diſcontinued, being no longer admitted to appeal anew.

This is liable to no difficulty when the tribunal where the appeal was depending, is a tribunal of the laſt reſort: it is not to be doubted in this caſe that the judgment of this tribunal, which declares the diſcontinuance of the appeal, being a final judgment, gives the force of the *thing judged* to the judgment appealed from, which it has confirmed. When the tribunal where the appeal was depending is not a tribunal of the laſt reſort, the judgment of this tribunal, which ſhould declare the diſcontinuance of the appeal, not

being a final judgment, the appellant againſt whom it has been rendered, may appeal from it. But upon this appeal, the judges ought only to examine the queſtion whether the diſcontinuance which the judge has declared was properly acquired; and if it appears to them that it was, they ought, without enquiring further into the merits, to confirm the judgment. If, on the contrary, the diſcontinuance was not properly acquired, in pronouncing the error of the judgment by which it was declared to be acquired, they remand the parties to proceed upon the merits.

15. Appeals, although not conteſted, may be the ſubject of a diſcontinuance, as well as thoſe which have been conteſted.

It is the firſt proceſs before the judge of appeal, to proceed upon the appeal, which introduces and forms the appeal, even when it ſhould not be followed by any other proceedings, not even by an appearance: this firſt proceſs alone is preſumed to form a ſuit ſubject to a diſcontinuance, which the party in whoſe favor the judgment has been rendered, may cauſe to be declared, at the end of three years after ſuch proceſs. This is expreſſed by the rule of the court, 28*th March*, 1692.

When the firſt proceſs has been followed by further proceedings, the time of three years for the diſcontinuance is counted only from the laſt proceedings. This time runs even againſt minors, ſaving their recourſe againſt their tutors. Bouchel, *biblioth. verbo per empt.*, adduces ſeveral caſes to this effect.

This time may be interrupted in ſeveral ways; by the death or change of condition of one of the parties, by the death of one of the attorneys, &c.

16. Although this time ſhould be expired, the diſcontinuance of the appeal is not acquired until a judgment has intervened which has ſo declared it; and if, after the time has expired and before the judgment has intervened, there has been ſome proceedings on the part of the party againſt whom the appeal has been taken, and he has not diſavow-

ed his attorney, the diſcontinuance will be ſaved and will not be pleadable until at the end of three years from the proceedings.

ARTICLE II.

Of judgments which are null and which cannot consequently have the authority of the thing judged.

17. There is a great difference between a judgment null and a judgment iniquitous. A null judgment is that which has been rendered contrary to judicial form, *sententia injusta:* a judgment is iniquitous, *sententia iniqua*, when the judge has judged wrong, *puta*, in condemning a party to pay what in truth he did not owe, or in diſcharging him from paying what he did owe. A judgment, although iniquitous, when it has been rendered according to judicial form, may have the authority of the *thing judged*, if it is in one of the caſes of the preceding article, and however iniquitous it may be, it is holden to be equitable without admitting any proof to the contrary.

On the contrary, a judgment null, which has been rendered contrary to judicial form, cannot have the authority of the *thing judged*, unleſs the informality has been cured.

A judgment may be null either in regard to what it contains, or in regard to the perſons between whom it has been rendered, or in regard to the judge who rendered it, or by the unobſervance of ſome judicial form.

§ I.

Of judgments which are null in regard to what they contain.

18. I. A judgment is null when the object of the condemnation which it pronounces, is uncertain. *Sententia debet esse certa.* For example. If a judgment were thus expreſſed. *We have condemned the defendant to pay to the plaintiff all that he owes him;* it is evident that ſuch a judgment would not have the authority of the *thing judged*, and would be abſolutely null: for what is due to the plaintiff, being neither explained by the judgment, nor by any inſtrument to which it relates, the judgment contains nothing certain.

This is decided by the law 3, *Cod. de sent. quæ sine certa quant. Hæc sententia, OMNEM DEBITI QUANTITATEM CUM USURIS COMPETENTIBUS SOLVE, judicati actionem præstare non potest, quum ita demum sine certa quantitate facta condemnatio autoritate rei judicatæ censeatur, si parte aliqua actorum certa sit quantitas comprehensa.*

19. It is not however neceſſary that the object of the condemnation ſhould be explained by the judgment, it ſuffices that it appear by ſome inſtrument to which the judgment relates. For example. A judgment which condemns to pay what is demanded, is valid and may have the authority of the *thing judged*, when what is demanded appears by the proceſs to which the judgment relates. *Quum Judex ait, Solve quod petitum est, valet sententia*; L. 59, §. 1, ff. *de re judic.*

20, Nor is it neceſſary that the object of the condemnation ſhould be any thing liquidated; it ſuffices that it is to be liquidated by the proper perſons; therefore a judgment which condemns the defendant to damages, or to an indemnity, is not the leſs entitled to have the authority of the *thing judged*, although theſe damages or this indemnity, not being yet liquidated, the object of the judgment ſhould not be any thing liquidated and certain: for it muſt become ſo by the eſtimation to be made by the proper perſons. This is what Alexander Severus decides: *Quamquam pecuniæ quantitas sententia non contineatur, sententia tamen rata est, quoniam INDEMNITATEM rei publicæ præstari jussit*; L. 2, *Cod. de sent. quæ sine cert. quant.*

21. II. A judgment is null when the object of the condemnation which it contains is ſomething impoſſible. *Paulus respondit impossibile præceptum judicis nullius esse momenti*; L. 3, ff. *Quæ sent. Idem respondit ab ea sententia cui pareri rerum natura non poterit sine causa appellari*; *d.* L. §. 1.

22. III. A judgment is null when it is expreſsly againſt the laws. *Si expressim sententia contra juris rigorem data sit ..... si SPECIALITER*, which is to ſay, expreſsly, *contra leges vel Senatus-consultum, vel constitutiones fuerit prolata*; L. 19,

ff. *de appell. Quum contra sacras constitutiones judicatur, appellationis necessitas remittitur*; L. 1, §. 2, ff. *quæ sent. sine appell.*

Obſerve that, for the judgment to be null, it is neceſſary that it ſhould have been pronounced expreſsly againſt the law; it is neceſſary that it ſhould have been judged that the law was not to be obſerved. But if it was only judged that the caſe in queſtion was not within the law, although indeed it was within it, this judgment is not preſumed to impugn the law; it is not null, it is only iniquitous, and relief cannot conſequently be had againſt it but by the uſual way of appeal: this is ſhewn by Calliſtrat: *Quum prolatis constitutionibus contra eas pronuntiat judex, eo quod non existimat causam de qua judicat per eas juvari, non videtur contra constitutiones sententiam dedisse; ideoque ab ejusmodi sententia appellandum est; alioquin rei judicatæ stabitur*; L. 32, ff. *de re jud.*

Obſerve alſo that the judgments which pronounce expreſsly againſt the laws, were among the Romans null *de pleno jure*: with us it is neceſſary to ſeek relief againſt theſe judgments before the council of error, when there is no ground for the common method of appeal.

23. IV. A judgment is null when it contains oppoſite diſpoſitions which imply contradiction. For example. Being ſued to give up an eſtate which you ſold me, I have called you in to guaranty my poſſeſſion: the judgment diſcharges me from the demand, and condemns you to return me the price of the eſtate which I have paid you, and my damages for its detention. Theſe diſpoſitions are oppoſite; for it is implied that I am diſcharged from the demand and my guarantee condemned. This contradiction in the judgment renders it null; therefore the plaintiff who has been by this judgment diſallowed his demand, may, if it is a judgment in the laſt reſort, have his relief by civil petition, on ſetting forth that this judgment is contradictory and contains a diſpoſition oppoſite to that of which he complains, which has diſallowed his demand. If he has let the time for his appeal paſs, the judgment will acquire againſt

him the force of the *thing judged:* but in regard to my guarantee, I think that although he should not be entitled to relief by the method of civil petition, I cannot be admitted to pursue against him the execution of this judgment, because the discharge which is here given from the demand made against me, for ever forbids the condemnation of my guarantee, and good faith does not permit that in retaining the thing, I should demand to have the price returned.

24. V. A judgment is null when it has pronounced upon what has not been demanded, or when it has condemned a party to more than has been demanded from him; for the judge is appointed only to resolve upon the demands which are brought before him, and he cannot consequently render the judgment except upon what is the object of the demand. *Potestas judicis ultra id quod in judicium deductum est nequaquam potest excedere:* L. 18, ff. *com. div.*

25. As the judgment is null when it condemns the defendant to pay what has not been demanded from him, it is also null when it has discharged the defendant from a demand which he has admitted; for in each case he has judged upon what was not the object of the contestation submitted to his judgment. The ordinance of 1667, *tit.* 35, *art.* 34, has comprehended both cases in saying that there is ground for the civil petition, when the judgment has been pronounced upon things *not demanded or not contested.*

26. These nullities in regard to this, that the judge has pronounced upon what was not submitted to his judgment, are not such *de pleno jure;* they must be opposed either by the common way of appeal, when the judgment is not a judgment in the last resort; otherwise by civil petition, and when the party has let the time pass without seeking relief against the judgment, these informalities are cured.

§. II.

Of the nullities of judgments, in regard to the parties between whom they have been rendered.

27. A judgment, to be valid, must be rendered between

parties capable of being parties to a ſuit, *quæ habent legitimam standi in judicio personam.*

All the proceedings had by one incapable of being a party to a ſuit, or againſt him, are null *de pleno jure*, as well as the judgments which might be rendered upon theſe proceedings.

28. The perſons who are not capable of being parties to a ſuit are, I. thoſe who have loſt their civil capacity whether by a condemnation to a capital puniſhment, or by becoming monks profeſſed. Nevertheleſs monks profeſſed, who have left their convent for a benefice, ſuch as are regular canonical curates, are reputed capable of being parties, as well plaintiffs as defendants; for although their benefice does not reſtore them to their civil capacity, yet as the adminiſtration of the property and rights of their benefice is granted to them, as well as that of their ſalary, it is neceſſary that they ſhould be able to be parties to a ſuit for what may concern the goods and rights of their benefice, and to actions which ariſe from the perſonal obligations which they have contracted or which may be contracted towards them.

29. Minors, who are under the power of tutors, are not capable of being parties to a ſuit: the actions which belong to them cannot be brought except by their tutors in their quality of tutors, and the actions which may be had againſt them, muſt not be brought againſt them, but againſt their tutors in this quality.

When the minor has no tutor, he who has an action to bring againſt him, muſt preſent a petition to the judge where the minor reſides, that he may be permitted to convoke the relations of the minor, to have a tutor provided for him, againſt whom, after he has been appointed, he may bring his action.

When minors are emancipated, they may be themſelves parties to a ſuit; but they cannot be without the aſſiſtance of

a curator who is for this purpoſe appointed by the judge and who muſt be a party in the cauſe with them.

30. A feme-covert cannot in the cuſtomary provinces, be a party to a ſuit, whether plaintiff or defendant, without being authoriſed by her huſband, or, at his refuſal, by the court. Therefore it is not ſufficient for thoſe who have an action to bring againſt a feme-covert to bring it againſt her alone; it is neceſſary that they ſhould bring it againſt her huſband alſo.

Finally a feme-covert is preſumed ſufficiently authoriſed by her huſband, when her huſband is a party to the ſuit with her, and in this the judicial acts are different from extrajudicial: for in order that a feme-covert may contract validly out of court, it does not ſuffice that her huſband ſhould be a party with her in the contract; it is neceſſary that it ſhould be in expreſs terms that he authoriſes her: as we ſhall ſee in treating of the marital power, at the end of the treatiſe on the contract of marriage.

This rule, that a feme-covert cannot be a party to a ſuit without being authoriſed, receives ſome exceptions: our cuſtom of Orleans, *art.* 200, permits her to bring actions without her huſband on account of injuries done to her, and to defend thoſe on account of injuries which ſhe is charged to have committed.

31. It remains for us to obſerve in regard to all perſons who are incapable of being parties to a ſuit; that this incapacity does not take away the power of proſecuting them, when they have committed a crime; and they may defend themſelves againſt the proſecution.

32. From this principle that, for a judgment to be valid, the parties ought to be capable of being parties to a ſuit, this conſequence was deduced, in the civil law, that the judgment rendered againſt a party who was dead before the judgment, was null: for to be capable of being a party to a ſuit it is neceſſary to be living at the time: when one has ceaſed to live he ceaſes to have any capacity. It is upon this ground that Paul ſays, *Eum qui in rebus human-*

is non fuit sententiæ datæ tempore, inefficaciter condemnatum videri; L. 1, ff. *quæ sent. sine app.*

In our law when the death of one of the parties does not happen till the ſuit is ready for judgment, that is to ſay, when there is no further proceedings to be had or counſel to be heard, the death of the party does not prevent the judge from giving the judgment, which is as valid as if it had been given in the life time of the party. This is the diſpoſition of the article 1, of the title 26, ordinance 1667. The ordinance has in this reſpect diſregarded the ſubtlety of the law, in order to avoid the uſeleſs delay and coſts which a revival of the ſuit would in this caſe occaſion.

When a party dies in the courſe of the proceedings and the attorney has notified his death in writing to the attorney of the other party, which is called an eſſoin *propter mortem*, the other party cannot from this time proceed any further, and no judgment can be rendered, until the ſuit has been revived by the heirs or other ſucceſſors of the deceaſed, or, on their having been cited to come in and defend, a judgment has been rendered which declares the ſuit revived: the proceedings had after the eſſoin, until the revival of the ſuit, as well as the judgments which ſhould be rendered, are null *de pleno jure, d. tit. art.* 182. While the death is not notified, the proceedings had by the other party, although ſince the deceaſe, are valid; *art.* 3: and it is the ſame with the judgments which he ſhould obtain.

33. It is alſo a nullity in a judgment which proceeds from the part of the party for or againſt whom it has been rendered, when he has proceeded for another without having the capacity to act for him.

For example. If in our cuſtom of Orleans which between perſons not noble, deprives the wife who has married a ſecond time of the tutelage of her children, and does not ſuffer it to paſs to her ſecond huſband, this ſecond huſband through an error, of which I have ſeen examples, brings a ſuit for the ſaid children in the capacity of their ſtep-fa-

ther, or he defends a ſuit for them, the judgment rendered upon this demand would be null from the defect of capacity in which this ſtep-father had proceeded.

For the ſame reaſon, if a huſband, who may alone and without his wife bring perſonal actions for his wife and defend them, thinking through error, that it is the ſame with regard to perſonal actions and thoſe that concern the lands and real eſtate of his wife, brings in his capacity of huſband ſuch actions, or defends them, the judgment rendered for or againſt him in this capacity will be null.

For the ſame reaſon, if a tutor after the time of his tutorſhip is expired continued to act for his ward, who had become of age, the proceedings and judgments rendered thereon would be null for the want of capacity.

But if, in the account which he has rendered to his minor, he has accounted for what was due by the debtors, he may in his own name, as having a ceſſion of the rights of his minor, purſue the ſaid debtors.

34. When I have given a ſpecial power to one to bring a ſuit for me, the ſuit muſt be in my name: it would be an irregular proceeding to bring the ſuit in the name of this attorney and in the capacity of attorney by my ſpecial authority. Hence this maxim, that it is only the king, who pleads by attorney.

§. III.

Of judgments which are null on account of the judges who have rendered them, or for want of the obſervance of judicial forms.

35. A judgment may be null on account of the judge who has rendered it, when he was without the character; as if he had not been admitted to his office, had been interdicted, or was incompetent.

Obſerve that the nullity which reſults from theſe defects is not *de pleno jure*; it is neceſſary to ſeek relief by way of appeal, to have it declared.

36. The unobſervance of ſome formality alſo renders the judgment null; as when judgment has been rendered

by default againſt a perſon who was not preſent and had not appointed an attorney, before his default had been noted by the proper officer, or before the expiration of the uſual time. Many other examples might be brought.

Theſe nullities are not ſuch *de pleno jure*; it is neceſſary to ſeek relief by way of appeal or oppoſition: and when it is a judgment of a ſupreme court or in the laſt reſort, by civil or preſidial petition; this kind of nullity being one of the cauſes which furniſh ground for theſe petitions, as we have ſeen *supra*, *n.* 6.

ARTICLE III.

What is the authority of the thing judged.

37. The authority of the *thing judged* cauſes whatever is contained in the judgment to be preſumed true and equitable; and this preſumption, being *juris & de jure*, excludes all proof to the contrary. *Res judicata pro veritate accipitur*; L. 207, ff. *de R. J.*

For example. The party who has been condemned to pay a thing is preſumed really to owe it; he in whoſe favor the judgment has been rendered may conſequently, after having notified it to him, conſtrain him to pay it, by the ſeizure and ſale of his real and perſonal property, without his being allowed to offer proof that he does not owe it.

Vice verſa, when the judgment has been given againſt the plaintiff, the things which he had demanded are alſo preſumed not to be due to him; ſo that he cannot afterwards be received to demand them: there ariſes from the judgment a plea which we call *exceptio rei judicatæ*, which renders him not receivable.

38. The authority of the *thing judged* excluding proof againſt what has been judged, the party againſt whom the judgment has been given is not admitted to prove that the judge has made an error, even of ſimple calculation. *Res judicatæ ſi ſub pretextu computationis inſtaurentur, nullus erit litium finis*; L. 2, *Cod. de re jud.*

Nevertheleſs if the error of calculation appears on the

judgment, this error corrects itself. *Puta*, if the judgment were thus expreſſed, "We have declared James debtor to "Peter of the ſum of fifty livres for a certain cauſe; alſo of "the ſum of twenty-five livres for another cauſe; the ſaid "ſums making together the ſum of one hundred livres, "which we have condemned James to pay to Peter:" the error of the calculation in this caſe in the judgment would correct itſelf, and Peter could not exact the ſum of one hundred livres, but only that of ſeventy-five.

39. The authority of the *thing judged* excludes contrary proof, ſo that the party againſt whom the judgment has been given is not receivable to conteſt it, although he ſhould bring material papers which he had only obtained ſince the judgment. *Sub ſpecie novorum inſtrumentorum poſtea reper-torum res judicatas reſtaurari exemplo grave eſt*; L. 4, *Cod. de re jud.*

This principle that the *things judged* cannot be re-examined on account of material papers recovered ſince the judgment, admitted, in the civil law, of an exception in the caſe in which the judgment had been rendered in a doubtful cauſe, for the deciſion of which the judge had deferred the ſupplementary oath to the party in favor of whom he rendered it: in this caſe the party who had failed, could, on account of material papers ſince diſcovered, be received to conteſt the judgment. L. 31, ff. *de jurejur.*

This exception to the principle ought not to apply in our law; for the ordinance of 1667, *tit.* 35, *art.* 34, admitting the party againſt whom the judgment has been rendered, to ſeek relief againſt it by civil petition, on account of material papers ſince diſcovered, only in the caſe in which it ſhould appear that they have been detained by the act of the other party, it is a conſequence that it cannot be admitted in other caſes.

Article IV.

In regard to what things the authority of the thing judged applies.

40. The authority of the *thing judged* applies only to

what was the object of the judgment. Therefore in order that the party who has failed in the ſuit which he had brought againſt me, may be prevented from maintaining a new ſuit which he has ſince brought againſt me by the plea *rei judicatæ*, ariſing from the authority of the *thing judged*, which the judgment has that has diſcharged me from his ſuit, it is neceſſary that his new ſuit ſhould have the ſame object which the firſt had from which the judgment has diſcharged me.

It is neceſſary, for this, that three things ſhould concur, I. it is neceſſary that he ſhould demand the ſame thing which was demanded in the firſt ſuit from which I am diſcharged; II. it is neceſſary that in the new ſuit he ſhould demand this thing for the ſame cauſe for which he had demanded it in the firſt: III. it is neceſſary that he ſhould demand it in the ſame capacity, and againſt me in the ſame capacity as in the firſt.

Quum quæritur hæc exceptio (rei judicatæ) noceat necne, inſpiciendum eſt an idem corpus ſit, quantitas eadem, idem jus; & an eadem cauſa petendi, & eadem conditio perſonarum; quæ niſi omnia concurrant, alia res eſt; L. 12; L. 13; L. 14, ff. *de except. rei jud.*

Finally, when theſe three things concur, in order that the exception *rei judicatæ*, may be allowed, it is not material whether it be *eodem an diverſo genere judicii*, that the queſtion determined by the judgment is renewed.

§. I.

What is required in the firſt place, ut ſit eadem res.

41. This principle, that, in order that the exception *rei judicatæ* may be allowed, it is neceſſary that the thing demanded be the ſame thing which was demanded in the firſt ſuit from which a diſcharge has been had, ought not to be underſtood too literally. *IDEM CORPUS in hac exceptione non utique omni priſtinæ qualitate ſervata, nulla adjectione, diminutioneve facta, ſed pinguius pro communi utilitate accipitur;* L. 14, V. *Idem corpus*, ff. *de except. rei jud.*

For example. Although the herd which I demand of you to-day be not compoſed of the ſame number of which it was compoſed at the time of the firſt ſuit which I brought, and from which the judgment has diſcharged you; I am, not the leſs, preſumed to demand the ſame thing, and conſequently am not receivable. *Si petiero gregem (& victus fuero), & vel aucto vel minuto numero gregis, iterum eumdem gregem petam, obstabit mihi exceptio;* L. 21, §. 1. ff. *d. t.*

42. I am likewiſe preſumed to demand the ſame thing when I demand ſome thing which makes a part of it. *Sed & si speciale corpus ex grege petam, si adfuit in eo grege, feta obstaturam exceptionem;* d. L. 21, §. 1.

This is ſhewn by Ulpian. *Si quis, quum totum petisset, partem petat, exceptio rei judicatæ nocet; nam pars in toto est; eadem enim res accipitur, & si pars petatur ejus quod totum petitum est; nec interest utrum in corpore hoc quæratur, an in quantitate, vel in jure;* L. 7, ff. *de except. rei jud.*

43. I am alſo preſumed to demand the ſame thing which I have demanded in my firſt ſuit from which the judgment has given a diſcharge, when I demand a thing which has proceeded from it, and which did not belong to me, or was not due except in the manner in which that from which it proceeded, and which I demanded in my firſt ſuit, had belonged to me or had been due to me.

For example. If, in our colonies, I had ſued you for the negro wench Catharine, which I claimed to have bought of you and for which I paid the price; and not having been able to prove this pretended purchaſe, a diſcharge was given from my demand by a judgment in the laſt reſort; I ſhall not be admitted to demand of you, upon the ſame foundation, the child which ſhe has afterwards had: for as this child cannot be due to me otherwiſe than as the mother was due to me, this would renew the queſtion which was determined by the judgment. *Si ancillam petiero* (add *& victus fuero*), *& post litem contestatam conceperit & peperit, mox partum ejus petam, utrum idem petere videor? Et quidem ita definiri potest, toties eamdem rem agi quoties apud judicem*

posteriorem id quæritur quod apud priorem quæsitum est; in his igitur fere omnibus exceptio (rei judicatæ) nocet; d. L. 7, §. 1.

44. For the same reason, if I have failed in my demand for a principal sum, I ought not to be admitted to demand the interest of this sum; for this interest cannot be due me, if the principal sum is not.

It is not the same in the inverse case: although I have failed in my suit for the interest of a sum, I am not the less receivable to demand this sum; for it does not follow, because the interest is not due, that the principal sum is not. *Si in judicio actum sit, usuræque solæ petitæ sint, non est ferendum ne noceat exceptio rei judicatæ*; L. 23, ff. *d. tit.*

45. If I have failed in a suit which I have brought against you for a right of foot-way, which I claim to have over your land, and I bring a suit against you for a right of way with beasts of burden, which I claim to have over the same land, ought I to be presumed to demand the same thing which I demanded in my first suit, in which I failed, and may you therefore oppose to me the plea *rei judicatæ*?

The reason to doubt for the affirmative, is that the right which I now demand, appears to include that which I have demanded in my first suit and in which I failed; since whoever has a right of way with beasts of burden has also the right of foot-way, and, it having been judged that I had not the right of foot-way, it follows, *a fortiori*, that I have not that for beasts of burden. The reason to decide, on the contrary, that there is no ground for the exception *rei judicatæ*, is that as these rights of way are different kinds of rights, the demand, which has for its object one of these kinds of rights, has a different object from that of the demand which is for another kind; one cannot then say that I demand the same thing which I have already demanded nor consequently oppose to me the plea *rei judicatæ*. As to what is said against it, that as it has been judged that I had not the right of foot-way, it has been judged, *a fortiori*, that I had not the right of way with beasts of burden, I

anſwer that it has been judged that I had not the right of foot-way, nor, *a fortiori*, for beaſts of burden, on my claim for the mere right of foot-way, which it has been judged does not belong to me. But becauſe I have not the ſimple right of foot-way, it does not follow that I may not have another right of way with beaſts of burden, which was not in queſtion at the time of my firſt ſuit and which I now demand. This is decided by Ulpian: *Si quis iter petierit, deinde actum petat, puto fortius defendendum aliud videri tunc petitum, aliud nunc, & ideo exceptionem rei judicatæ ceſſare;* L. 11, §. 6, ff. *d. tit.*

We muſt decide otherwiſe when the right of way which I demand, is of the ſame kind which I had claimed in my firſt ſuit from which a diſcharge has been given, although I claim it more conſiderable than I did then. Africanus adduces this example: *Egi tecum jus mihi eſſe ædes meas usque ad decem pedes altius tollere; post ago jus mihi eſſe usque ad viginti pedes altius tollere; exceptio rei judicatæ procul dubio obſtabit: ſed & ſi rurſus ita agam jus mihi eſſe ad alios decem pedes tollere, obſtabit exceptio; quum aliter ſuperior pars jus haberi non poſſit, quam ſi inferior quoque jure habeatur;* L. 86, ff. *de tit.*

§. II.

What is required in the ſecond place, ut ſit eadem cauſa petendi.

46. In order that there may be ground for the exception *rei judicatæ*, it does not ſuffice that the thing which you demand of me ſhould be the ſame which you have demanded of me in your firſt ſuit from which I have been diſcharged; it is neceſſary that you ſhould demand it for the ſame cauſe for which you had before demanded it: *oportet ut ſit eadem cauſa petendi.*

There is in this reſpect a difference to be obſerved between perſonal actions and actions real. Although I have failed in a perſonal action by which I demanded of you a thing which I claimed to be due me on a certain ground of obligation, this does not exclude me from demanding

of you the ſame thing which I claim to be due me, on another ground of obligation.

Fuge. I have made with you a bargain, by which we agreed that for a certain work which I was to do for you, and which I have ſince done, you ſhould give me the ſum of two hundred livres, or your horſe, at my choice. Afterwards you ſold me your horſe for a certain price. I brought againſt you the action *ex empto*, that you might be condemned to deliver me the horſe; and, not being able to prove the ſale which you made to me, a judgment in the laſt reſort has been rendered againſt me. This does not exclude me from demanding of you the ſame horſe by the action *præscriptis verbis*, which ariſes from the bargain which we made for the work I have ſince done for you.

On the contrary, in actions real, if I have claimed a certain thing which you had in poſſeſſion and which I claimed as belonging to me, the judgment which has been given againſt me, excludes me from bringing againſt you a new ſuit to conteſt with you again the property of this thing, although I ſhould pretend to prove that it belonged to me on another ground than that which I offered at the time of the firſt ſuit in which I failed.

The reaſon of the difference is, that the ſame thing may be due on ſeveral different grounds of obligation, and I have as many different claims for this thing and as many different actions againſt my debtor, as there are different grounds of obligation from which they ariſe; which different actions include as many different queſtions. The judgment againſt me in one of theſe actions, has determined nothing upon the other actions which I may have and the queſtions they may include; and it cannot conſequently exclude me from bringing them.

The judgment in the action *ex empto*, which I brought againſt you, in which it was judged that you did not owe me on the contract of ſale the thing which I demanded of you, has not determined that you do not owe it to me on another contract, and does not therefore exclude me from

demanding it of you in another action which arises from this other contract.

It is not the same with regard to the right of property. If one may have different claims for the same thing, he cannot, on the contrary, have more than one and the same right of property to the same thing: therefore when, by a judgment which has been brought against me in a suit for a certain thing, it has been judged that the property of this thing did not belong to me, I can no longer have other actions against you to recover this property: it would be to renew the same question which has been determined by the judgment; for this question was singly whether the thing belonged to me or not. It is of no consequence that I have omitted to offer any proof by which I could establish my right of property; it suffices that I had it in my power to offer it.

This is shewn by Paul: *Actiones in personam ab actionibus in rem in hoc differunt, quod cum eadem res ab eodem non debeatur, singulas obligationes singulæ causæ sequuntur, nec ex earum alterius petitione vitiatur: at quum in rem ago, non expressa causa ex qua rem meam esse dico, omnes causæ una petitione apprehenduntur neque enim amplius quam semel res mea esse potest, sæpius autem deberi potest;* L. 14, §. 2, ff. *de exc. rei jud.*

Hence this rule of law, *Non ut ex pluribus causis idem nobis idem potest, ita ex pluribus causis idem possit nostrum esse;* L. 159, ff. *de R. J.*

47. What we have just said in regard to the action rei applies only when it has been brought in a general manner and without restriction; but as to the suit which I brought if I have restricted it to a certain ground whereon I claim to be the proprietor of the thing, the judgment by which it has been judged that I was not entitled on this ground would not exclude me from claiming the same thing on another ground on which I pretend to be able to establish that it does belong to me.

For example. If being the person whom the law calls

to the succession of my intestate relation, I have opposed his will as forged or inofficious, and thereupon claimed the inheritance against the legatee who was in possession, although I have failed in the charge of its being forged or inofficious, this will not exclude me from bringing a new suit for the inheritance on other grounds: *Etsi quæstionis titulus prior inofficiosi testamenti causam habuisset, judicatæ rei præscriptio non obstaret eamdem hæreditatem ex alia causa vindicanti;* L. 3, *Cod. de petit. hæred. Add.* L. 47, ff. *de petit. hæred.*

48. However general the first demand for the thing may have been, the judgment which has dismissed the suit does not exclude me from making a new demand when I pretend to have become the proprietor of it by a title which has accrued since the judgment; for this judgment, in determining that I was not then the proprietor of this thing, does not establish that I have not being able to acquire the property of it since. The question which must make the object of the new demand, which is whether the title fallen since the judgment has not given me the property of this thing, is a question different from that which made the object of the first; for it is a principle that the plea *rei judicatæ* can only apply when the same question is renewed which has been determined by the judgment rendered on the first demand.

§. III.

Of the third requisite, ut sit eadem conditio personarum.

49. The third thing requisite for the exception *rei judicatæ*, is that he who demands from me the same thing which he had already demanded in a former suit which the judgment has dismissed, should make this new demand against me in the same capacity in which he proceeded on the other demand. For example. If in my capacity of tutor of a minor, I have demanded of you a certain thing, the judgment which has discharged you therefrom, does not exclude me from demanding of you in my own name the same thing, and *vice versa:* for when I was a party to

the firſt ſuit in the capacity of tutor, I was not properly a party, it was my minor who was a party by my interpoſition. The new ſuit which I bring in my own name is not then between the ſame parties and it cannot conſequently be excluded by the authority of the *thing judged* in the former ſuit; for this authority cannot apply except between the ſame parties between whom the judgment was rendered, as we ſhall ſee in the following article.

§. IV.

That it is not material whether it be eodem an diverſo genere judicii.

50. Provided the three things which we have explained in the preceding paragraphs concur, it is not material for the exception *rei judicatæ*, that the queſtion determined by a judgment which has the authority of the *thing judged*, ſhould be renewed *eodem an diverso genere judicii. Generaliter, ut Julianus definit, exceptio rei judicatæ obstat, quoties inter easdem personas eadem quæstio revocatur, vel alio genere judicatæ*; L. 7, §. 4, ff. *de except. rei judic.*

Several examples of this principle may be adduced. *Finge.* You have brought againſt me the action *quanto minoris*, that I might be condemned to make an abatement in the price of a certain horſe which I have ſold you, pretending that the horſe has a certain defect againſt which I warranted; it was determined that the horſe had not this defect, or that it was a defect which I did not warrant againſt, and I was diſcharged from your demand. If afterwards you ſhould bring againſt me the action *redhibitoria*, on account of the ſame horſe and the ſame defect, that I might be condemned to take it back, I may oppoſe to you the plea *rei judicatæ*, which ariſes from the judgment diſcharging me from your demand; although this new action which you bring againſt me ſhould be another kind of action and you pray different relief. The three things requiſite for this exception concur. It is the ſame horſe which was the object of your firſt action, in which the judgment was rendered, that makes the object of this; it is *eadem*

res; it is also *eadem causa petendi*, for the question in this new action is, as upon the first, whether I have warranted against the defect you complain of; and this question is renewed *inter easdem personas*, which suffices for the exception to apply. The difference of the action and relief sought does not prevent this new action from having the same object as the first, and being therefore *eadem res: Cum quis actionem mutat et experitur, dummodo de eadem re experiatur, etsi diverso genere actionis quam instituit, videtur de eadem re agere*; L. 5, ff. *de tit.*

ARTICLE V.

Between what persons the authority of the thing judged *applies.*

51. The authority of the *thing judged* applies only between the same parties between whom the judgment has been rendered; it gives no right either to or against third persons: *Res inter alios judicatæ neque emolumentum afferre his qui judicio non interfuerunt, neque præjudicium solent irrogare*; L. 2, *Cod. quib. res jud. non noc.*

Sæpe constitutum est res inter alios judicatas aliis non præjudicare; L. 63, *de re jud.*

In applying this principle it is necessary to examine, first, in regard to what persons the *thing judged* is presumed to be judged between the same parties, so that it may have the force of law between them; and in regard to what persons on the contrary the *thing judged* is presumed to be *res inter alios judicata*, from which no right can arise, either in their favor or against them.

52. The thing is presumed to be judged between the same parties, not only in regard to persons who have been parties by themselves, but in regard to those who have been parties by their tutors, curators or other lawful administrators, who have a capacity to bring and defend their actions.

For example. If the tutor of a minor, in his capacity of tutor, has brought a suit against me in which judgment was given in my favor, and this minor coming of age, brought a suit against me for the same demand, I may cause him to be declared not receivable, by the plea *rei judicatæ*;

for the judgment rendered againſt the tutor is reputed to be rendered againſt the minor who was the true party by the interpoſition of his tutor.

For the ſame reaſon, if the wardens of a certain pariſh in their capacity of wardens, have brought againſt me a ſuit in which judgment was given in my favor, and their ſucceſſors bring a new action for the ſame demand againſt me, I may cauſe them to be declared not receivable, by the plea *rei judicatæ*, for it was the pariſh that was party to the ſuit in which judgment was given in my favor, and it cannot be therefore that, by the interpoſition of the new wardens, a ſuit may be brought againſt me for the ſame demand, which was determined by a judgment in which they were party by the interpoſition of their predeceſſors.

53. The ſucceſſors of parties are preſumed to be the ſame parties with the perſons to whom they have ſucceeded; therefore the thing judged is, in regard to them, reputed to be between the ſame parties, and conſequently has in their favor or againſt them the ſame authority of the *thing judged* which it would have had for or againſt the party to whom they have ſucceeded.

For example. The judgment which has diſcharged me from your demand, gives to my heirs as well as to me the plea *rei judicatæ* againſt your heirs as well as againſt you, if they ſhould bring a ſuit for the ſame demand.

54. This cannot be doubtful in regard to the heirs and other general ſucceſſors who are *hæredum loco*. In actions real, he who has ſucceeded, although in regard to a ſingle claim, to one of the parties, for the thing which was the object of a ſuit, is alſo preſumed to be the ſame party. For example. When you have brought a ſuit for a certain eſtate againſt Peter, the judgment which has been given in favor of Peter, will give to him who has ſince purchaſed this eſtate from Peter, the plea *rei judicatæ* againſt a new ſuit for this eſtate, if brought againſt this purchaſer; becauſe in regard to this he is preſumed to be the ſame party with Peter to whom he has ſucceeded. L, 11, §. 3, ff, *de exc. jud.*

For the ſame reaſon, if I had brought a ſuit againſt the proprietor of a neighbouring eſtate to make him deſtroy a work by which I pretended that he had ſent the waters of his land upon mine, and, ſince the judgment rendered upon this ſuit, he has ſold his eſtate or I mine, the judgment rendered between us will give to the purchaſer the plea *rei judicatæ*, if a new ſuit on account of this work is brought againſt him; or will give this plea againſt him, if he brings a new ſuit; *de Leg.* §. 9.

55. The laws cited are in the caſe of a purchaſer; it cannot be doubtful in regard to a purchaſer that when a new ſuit is brought againſt him there is ground for the plea *rei judicatæ*, which the ſeller could have pleaded; for this action will affect the ſeller who is bound to warrant and defend the purchaſer.

Although this action ceaſes in regard to the ſucceſſors by a lucrative title without warranty, we muſt decide however that they ought to be reputed to be the ſame party with him to whom they have ſucceeded in the eſtate which was the object of the judgment, and that they may, like him, oppoſe to the party againſt whom this judgment has been rendered, the authority of the thing judged which reſults therefrom. For example. If I have procured againſt you a judgment that my eſtate did not belong to you, or that it was not ſubject to a certain right of way to which you pretended it was ſubject, and you ſhould bring againſt him to whom I have ſince paſſed this eſtate by gift, a new ſuit, either to recover it or to ſubject it to the ſame right of way, the donee, as being in my right, may oppoſe to you the plea *rei judicatæ*.

Why? For this reaſon. When we make any agreement in regard to a thing which belongs to us, we are preſumed to ſtipulate as well for all thoſe who ſucceed to us for this thing, who are compriſed under the term *aſſigns*, as for ourſelves; and conſequently the right which reſults from this agreement paſſes to all our ſaid ſucceſſors or aſſigns, as we have ſeen *ſupra* in the beginning of this trea-

tiſe, *n.* 67, 62. As, when we have a ſuit at law in regard to a certain thing which belongs to us, we are preſumed to act as well for all our aſſigns and ſucceſſors to this thing, as for ourſelves; and the right which reſults from the judgment which is rendered in this ſuit, muſt paſs to all our ſucceſſors and aſſigns.

56. In the ſame manner as the ſucceſſor may plead the judgment which has been rendered in favor of his predeceſſor, as we have juſt ſeen, ſo, *vice versâ*, may the judgment rendered againſt the predeceſſor be pleaded againſt the ſucceſſor; provided however that he has ſucceeded to his predeceſſor ſince the ſuit upon which the judgment was rendered againſt his predeceſſor. *Finge.* Peter has brought againſt you a ſuit for a certain eſtate, in which judgment was given in your favor. Peter afterwards mortgages to me this eſtate. If I bring an action againſt you to compel you to give up the eſtate, and I offer to prove that Peter, my debtor, was the proprietor of it, and has validly mortgaged the ſame to me, you may oppoſe to me the exception *rei judicatæ*, reſulting from the judgment which you have obtained againſt Peter, my predeceſſor, which, in diſcharging you from his demand, has determined that it did not belong to him, and conſequently that he could not mortgage it to me.

It would be otherwiſe if Peter had mortgaged the eſtate before the ſuit which he had againſt you. You could not in this caſe oppoſe to me the judgment which you had obtained againſt him; for this judgment by which it has been determined that Peter was not then the proprietor of the eſtate, does not decide that he could not have been ſo before he mortgaged it to me; and on my proving that he was proprietor of it then, my action may be maintained againſt you, although he afterwards ceaſed to be the proprietor, and was not at the time of the ſuit between you and him; L. 11, §. 10, ff. *de except. rei jud.*; L. 3, ff. *de pign. & hyp.*

57. Although a judgment is preſumed to have been

rendered for or againſt the ſucceſſor, when it was for or againſt his predeceſſor, the ſame cannot be ſaid *vice-versa*.

Therefore neither the judgment rendered for or againſt the ſucceſſor nor the plea *rei judicatæ* which reſults therefrom, can be pleaded by or againſt his predeceſſor. *Julianus scribit exceptionem rei judicatæ personæ autoris ad emptorem transire solere; retro autem ab emptore ad autorem reverti non debere;* L. 9, §. 2, ff. *de except. rei jud.*

He adduces this example: *Si hæreditariam rem vendideris, ego eamdem ab emptore petiero & vicero; petenti tibi non opponam exceptionem.* AT SI EA RES JUDICATA NON SIT *inter me & eum cui vendidisti; d. §. item si victus fuero, tu adversus me exceptionem non habebis;* L. 10.

58. We have eſtabliſhed that a judgment was, in regard to any one, preſumed to be rendered between the ſame parties, whether he had been a party himſelf in the ſuit in which the judgment is had, or his predeceſſor had been a party to it. On the contrary in regard to thoſe who have not been parties either by themſelves, or by their predeceſſors, this judgment is *inter alios judicata*, which cannot be oppoſed to them by the party in favor of whom it has been rendered, nor by them to the party againſt whom it has been rendered. This applies although the queſtion between them is the ſame with that which has been determined by this judgment, although it is decided on the ſame grounds, and depends even upon the ſame fact.

This will appear by the example which Paul adduces. I have entruſted a certain ſum to a perſon who has left ſeveral heirs. Having demanded from one of the ſaid heirs the reſtitution of this ſum for the part for which he was bound, the judge who has not given ſufficient attention to the proofs upon which I eſtabliſhed this depoſit, has given judgment for the defendant. If I demand from the other heirs the reſtitution of the parts of this ſum for which they are bound, they cannot oppoſe to me the judgment in favor of their co-heir; becauſe this judgment to which they were not parties is, in regard to them, *res inter alios judi-*

cata, which cannot give them any right, although the queſtion is the ſame with that which has been determned againſt me by the judgment in favor of their co-heir, and it depends on the ſame fact, which is whether I really entruſted this ſum to the deceaſed, and whether he has not returned it to me. *Si cum uno hærede depositi actum sit, tamen & cum cæteris hæredibus recte agetur; nec exceptio rei judicatæ eis proderit; nam etsi eadem quæstio in omnibus judiciis versetur, tamen personarum mutatio cum quibus singulis suo nomine agitur, aliam atque aliam rem facit;* L. 22, ff. *de except. rei jud.*

This principle, that the authority of the *thing judged* does not apply in regard to perſons who have not been parties and who are not the ſucceſſors of one of the parties, is ſupported by another principle which we have eſtabliſhed in the preceding article, that the authority of the *thing judged* applies only in regard to the ſame thing on which the judgment has determined.

For example in the inſtance above adduced, if the judgment which has been given in favor of one of the heirs of the debtor, in a ſuit by a creditor of the deceaſed for the part of the debt for which it was pretended he was bound, has not the authority of the *thing judged* in favor of the other heirs for the parts for which it is pretended they are bound; it is not merely becauſe it is *res inter alios judicata;* it is alſo becauſe what is claimed from them is not the ſame thing with that which was the object of the judgment rendered in favor of their co-heir: for the parts of the debt which are claimed from them are indeed parts of the ſame debt, but they are not the ſame part of this debt which was claimed from their co-heir. The judgment rendered in favor of their co-heir has determined only upon this part, and cannot conſequently have the authority of the *thing judged*, in regard to the other parts which are claimed from them. This is the meaning of the law above cited. *Mutatio personarum cum quibus singulis suo nomine agitur, aliam atque aliam rem facit.*

Likewiſe, when a creditor has left ſeveral heirs, the debtor in whoſe favor judgment has been given in the ſuit brought by one of the heirs for his part, cannot oppoſe this judgment againſt the ſuits which the other heirs bring for their parts; this judgment being *res inter alios judicata*, and not being *eadem res*; for theſe parts which the other heirs claim, although parts of the ſame debt, are not the ſame part with that which was the object and ſubject of the judgment.

59. It is not the ſame when the thing due to ſeveral heirs or other perſons joint-owners, is ſomething indiviſible, ſuch as a right of way. This thing not being ſuſceptible of parts, each of them is creditor or joint-owner of the whole; therefore the judgment rendered in the ſuit which one of them has brought for this thing had for its object the ſame thing which was the object of that brought for it by the others; it is *eadem res*. We may alſo ſay that this judgment is not *inter alios judicata*, in regard to the other creditors or joint-owners of this thing; for the indiviſibility of their right with his own, cauſes them to be regarded as being the ſame party with him. This judgment has then in regard to them the authority of the *thing judged*: when it has been rendered in favor of their co-owner or co-creditor, they may, as well as he, oppoſe it to the party againſt whom it has been rendered, and if it has been rendered againſt their co-owner or co-creditor, it may be oppoſed to them, as it has been to him.

Yet if the judgment had been rendered by colluſion, the law permits them to renew the ſuit. *'Si de communi servitute quis bene quidem deberi intendit, sed alio modo litem perdidit culpa sua, non est æquum hoc cæteris damno esse; sed si per colluſionem cessit litem adversario, cæteris dandam esse actionem de dolo;* (which is to ſay, as is well explained in the commentary, *replicationem de dolo contra exceptionem rei judicatæ*); L. 19, ff. *si serv. vind.*

60. According to our uſages, the judgment rendered againſt one of ſeveral creditors or joint-owners of an indi-

cata, which cannot give them any right, although the queſtion is the ſame with that which has been determined againſt me by the judgment in favor of their co-heir, and it depends on the ſame fact, which is whether I really entruſted this ſum to the deceaſed, and whether he has not returned it to me. *Si cum uno hærede depositi actum sit, tamen & cum cæteris hæredibus recte agetur; nec exceptio rei judicatæ eis proderit; nam etsi eadem quæstio in omnibus judiciis vertitur, tamen personarum mutatio cum quibus singulis suo nomine agitur, aliam atque aliam rem facit*; L. 22, ff. *de except. rei jud.*

This principle, that the authority of the *thing judged* does not apply in regard to perſons who have not been parties and who are not the ſucceſſors of one of the parties, is ſupported by another principle which we have eſtabliſhed in the preceding article, that the authority of the *thing judged* applies only in regard to the ſame thing on which the judgment has determined.

For example in the inſtance above adduced, if the judgment which has been given in favor of one of the heirs of the debtor, in a ſuit by a creditor of the deceaſed for the part of the debt for which it was pretended he was bound, has not the authority of the *thing judged* in favor of the other heirs for the parts for which it is pretended they are bound; it is not merely becauſe it is *res inter alios judicata*; it is alſo becauſe what is claimed from them is not the ſame thing with that which was the object of the judgment rendered in favor of their co-heir: for the parts of the debt which are claimed from them are indeed parts of the ſame debt, but they are not the ſame part of this debt which was claimed from their co-heir. The judgment rendered in favor of their co-heir has determined only upon this part, and cannot conſequently have the authority of the *thing judged*, in regard to the other parts which are claimed from them. This is the meaning of the law above cited. *Mutatio personarum cum quibus singulis suo nomine agitur, aliam atque aliam rem facit.*

gainſt the principal debtor, the creditor may oppoſe it to the ſecurity, and demand that it may be executed againſt him; but the ſecurity is received to appeal from this judgment, or if it is rendered in the laſt reſort, to conteſt it. *Admittuntur ad provocandum fidejussores pro eo pro q o intervenerunt;* L. 5, §. 1, *item fidejussores;* ff. *de appell.*

62. According to the principles of the civil law, the right of legatees depending upon that of the teſtamentary heir, the judgment rendered againſt this heir, which has declared the teſtament null, is not regarded in reſpect to theſe legatees as *res inter alios judicata*, and may be oppoſed to them: the right of theſe legatees depending upon that of the teſtamentary heir, cauſes them to be deemed, in a certain manner, the ſame party with the heir; but they are received to appeal; L. 5, §. ff. *de appell.;* or when the judgment is in the laſt reſort, to conteſt it.

It is otherwiſe in regard to a judgment which upon the ſuit of a legatee, has declared the teſtament null; this judgment is, in regard to other legatees, *res inter alios judicata*, which cannot be oppoſed to them, and from which they have no need to appeal. L. 1, ff. *de except. rei jud.* The reaſon of the difference is, that the right of the legatees does not depend upon that of their co-legatee, againſt whom the judgment has been rendered; whereas it does depend upon the right of the teſtamentary heir; *Quum ab institutione heredis pendeant omnia quæ testamento continentur.*

SECTION THE SECOND.

Of the oath.

8 7. There are three principal kinds of oaths which are uſed in civil proceedings; I. the oath which one party defers or refers to the other, to reſt on it the deciſion of the cauſe, and which is for this reaſon called the deciſory oath. II. the oath which the party muſt take who is examined upon interrogatories. III. The oath which the judge defers of his own accord to one of the parties either to decide the cauſe, or to fix or determine the amount of the damages; it is called *juramentum judiciale.*

Article the First.

Of the decisory oath.

818. The decisory oath is, as we have said, that which a party defers or refers to the other; to rest on it the decision of the cause.

§. I.

Upon what things the decisory oath may be deferred.

819. The decisory oath may be deferred upon any kind of contestation whatever, and in any kind of civil suit, in possessory, as well as real actions, in actions *in personam* as well as *in rem*. *Jusjurandum & ad pecunias & ad omnes res locum habet*; L. 34, ff. *de jurejur.*

The oath cannot however be deferred except upon what is the proper act of the party to whom it is deferred; a party is not obliged to take it upon what is the proper act of another person of whom he is heir or in whose rights he is: for I cannot be ignorant of my own act, whereas I do not necessarily know what is the act of another to whom I have succeeded. *Heredi ejus cum quo contractum est, jusjurandum deferri non potest; Paul, sent,* II, 1, 4.

A person who demands from me the price of a thing which he pretends to have sold to the deceased whose heir I am, cannot then defer to me the oath upon the fact of the thing's being sold to the deceased; for this is not my act, it is the act of the deceased which I do not necessarily know. But the usage among us is, that in this case the oath may be deferred upon the question whether I have any knowledge that the deceased owed the sum demanded; for in this case the oath cannot be deferred upon the fact of the sale which is the act of the deceased, but it may be deferred upon the knowledge which it is pretended I have of the debt which is my proper act.

§. II.

In what case the decisory oath may be deferred.

820. The plaintiff may defer the oath to the defendant, whenever the plaintiff thinks he has not sufficient

proof of the fact which makes the ground of his demand. Likewife the defendant may defer the oath to the plaintiff when he has not proof of the fact, which makes the ground of the defence he muft fet up againft the demand.

This oath may be deferred as well before as after the plea in chief, in an appeal as well as in an original fuit.

It is a queftion which has been much controverted whether fome inchoate proof is neceffary for the plaintiff to be received to defer the oath; or whether he muft be received although he has not the leaft inchoate proof of his demand? The glofiary *ad L. 3. cod. de R. cred.*, Bartolus, Baldus, and feveral other authors cited by Mafcardus, *de probat. concl.* 937, require fome inchoate proof. The reafons which they allege for this opinion are, I. that it is a general principle of law that the defendant ought to have judgment when the demand againft him is not proved, without being holden to any thing in order to obtain it. *Actor non probante, qui convenitur, & si nihil ipse præstet, obtinebit*; L. 1, *cod. de edend.* Therefore, fay they, the defendant ought not to be holden, in order to obtain judgment againft a demand of which there is no inchoate proof, to take the oath, and the plaintiff ought not to be received to defer it to him, fince the law fays he is not to be holden to any thing, &c. *si nihil ipse præstet.* II. It is a further principle of law that the plaintiff muft furnifh on his part proofs of his demand and it is not for the defendant to furnifh them againft himfelf. *Intelligitis quod intentionis vestræ proprias adferre debetis probationes, non adversus se ab adversariis adduci*; L. 7, *cod. de test.* Therefore, fay they, the plaintiff who brings no proof of his demand ought not to be admitted to procure it by deferring the oath, to the defendant. III. They fay that one ought not without any ground to be received to bring fuit againft another; and occafion him the embarraffment of taking an oath which fcrupulous perfons with difficulty take upon things of which they think they are moft certain: they pretend to derive alfo fome argument from the law 31, ff. *de jurej.*; from the laws 11, & 12, *cod de reb.*

cred. The contrary opinion, that the plaintiff has no need of any inchoate proof, to be received to defer the oath to the defendant, is more correct, and it has been embraced by Cujas *obs.* 22. 28, Dauren, Doneau, and by several others: it is also that of Vinnius, who has thoroughly treated of the question, *select. quæst.* 1, 42, and which we only copy here. The reasons upon which it is established are, I. that one ought not to exact from the plaintiff what the law which has established the use of the decisory oath has not required from him: the edict of the prætor which established this law does not at all require any inchoate proof of his demand. It says without distinction, *eum a quo jusjurandum petitur, jurare aut solvere cogam;* L. 34, §. 6, ff. *de jurej.* II. it may happen very often that a demand of which there is no inchoate proof, is not at the same time the less just. For example. I have lent a friend a sum of money without taking any receipt or note. The demand which I make of him for the restitution of this sum, is not the less just in itself, although I have no inchoate proof of the loan which is the ground of it. The judge ought not to neglect any means which present themselves to discover the truth, in order to render justice to whom it is due. I present him one of doing so, by deferring the oath to the defendant; for if he refuses to swear that I have not made him any loan or that he has returned it to me, his refusal to swear will be an implied avowal of the debt. The judge ought then to take this mode of discovering the truth and admit me to defer the oath to the defendant, although I have no inchoate proof of my demand; the refusal which I hope the defendant will make to swear, may be of itself a complete proof of the debt and of the wrong which he has done in refusing the payment. *Manifestæ turpitudinis & confessionis est, nolle jurare;* L. 28, ff. *de jurej.* III. This opinion is further established by formal texts of law. It is said in the law 12, *cod, de reb. cred.*, that this oath may be deferred even in the beginning of the suit, *in principio litis*, and consequently even before the plaintiff has furnished any proof. The law 35, ff. *de jurej*, is expressed in terms still

more formal; it says the oath may be deferred, *omnibus aliis probationibus deficientibus.*

In regard to the reasons above alledged for the first opinion, they are very frivolous and it is easy to answer them. When it is said the defendant ought to have judgment in his favor on a demand which is not proved, without being holden to any thing in order to obtain it, *etiamsi nihil ipse præstet* this signifies nothing else than that, in order to obtain this judgment, he has no need to produce on his part any proof; but this does not at all signify that he shall not be holden to take the oath, when it is deferred to him. As to what is said in the law 7, *cod. de test.*, that the defendant ought not to be obliged to furnish proof against himself, this applies only to what is said in the beginning of the law, that the defendant ought not to be obliged to produce witnesses or papers against himself: *Nimis grave est quod petitis, urgeri partem diversam ad exhibitionem per quos sibi negotium fiat:* but this has no application to the deferring of the oath; a party cannot complain that he has been treated with hardship, when by the oath which is deferred to him he is himself rendered a judge of his own cause. In regard to what has been said that it is an inconvenience that a person without any ground, without any inchoate proof, should have it in his power to put another to the trouble of taking an oath, I answer that we cannot obviate all inconveniences. The trouble of defending a suit is indeed greater than that of taking an oath, since one may put a ready end to the latter by doing as required. However a person may, without any ground, by bringing against me a suit entirely unsupported by proof, occasion me the trouble of defending it. Why may he not as well give me the trouble of taking the oath, by deferring it to me? The Romans had established a kind of remedy against these inconveniences by the oath which the parties were obliged to take before the trial of the cause, that it was with good faith that they carried on the suit, and by that which the party who deferred the oath was likewise obliged to take, that he deferred it *bona fide* with the sole view to discover

the truth, and without any view to vex the party to whom he deferred it; which they called *juramentum de calumnia*. Theſe oaths are not in uſe among us. In regard to the laws alledged for the firſt opinion, nothing reſults therefrom. A queſtion is made in the law 31, only of the ſupplementary oath which is deferred by the judge, and not of the deciſory oath. There reſults indeed from the law 12, that there may be a queſtion among the parties whether the oath has been well or ill deferred; but this queſtion concerns either the nature of the fact upon which it has been deferred, or the quality of the party who defers it, or of the party to whom it is deferred, and it does not at all relate to the plaintiff's having any inchoate proof, this being indifferent.

§. III.

Of the perſons who may defer the oath, and to whom it may be deferred.

821. As the deciſion of the ſuit and the right of the parties are made to depend on this oath, it follows that it is only thoſe who have the diſpoſition of their rights, who may defer this oath, and to whom it may be deferred.

Therefore a minor cannot, without the authority of his tutor, defer this oath; L. 17, §. 1, ff. *de jurej.*; and it cannot be deferred to him; L. 34, §. 2, ff. *d. tit.*

According to this principle, an inſolvent perſon cannot, in fraud of his creditors, defer the oath to his debtor upon what is due to him; for he cannot diſpoſe of his rights in fraud of his creditors. Therefore his creditors, without having regard to the oath taken by this debtor of their debtor, may attach what he owed, and, by proving the debt, obtain a judgment againſt him as garniſhee: L. 9, §. 5, ff. *d. tit.*

Some authors have maintained that he to whom the oath cannot be referred, becauſe on ſomething which is not his proper act, and of which he has no knowledge, is not to be received to defer the oath to his adverſary, although it ſhould be on the proper act of this adverſe party. This is the opinion of Natta, *cons.* 35. It is founded upon

the law 33, ff. *de jurej.*, where it is ſaid that he to whom the oath is deferred cannot complain that any wrong is done thereby, becauſe he may refer it. *De injuria queri non potest, quum possit jusjurandum referre.* Therefore, ſays he, arguing *a contrario*, he to whom the oath is deferred, is not obliged to accept the condition when he cannot refer it. This conſequence is badly drawn; for the reaſon alledged in the law 34, *quum possit jusjurandum referre*, is put as further reaſon why he to whom the oath is deferred cannot complain: the principal reaſon which is alledged elſewhere and which ſuffices alone, is that no perſon can complain of being made a judge in his own cauſe. The contrary opinion, which is that of Fachinæus, of Cravetta and other autors by him cited, is founded upon reaſons more ſolid. We ought not to exact from him who defers the oath, what no law requires from him; there is no law which requires that he who defers the oath ſhould be ſuch a perſon as that it could be referred to him. On the contrary the law 17, §. 2, expreſsly permits a tutor and a curator to defer the oath in the cauſes which they bring in this capacity, although it cannot be referred to them; ſince the cauſe of the ward or of the perſon interdicted, is not the proper act of the tutor or curator.

An attorney cannot defer the oath, unleſs he has a ſpecial power or is an attorney *universorum bonorum*, that is to ſay, unleſs he has a general power to adminiſter. L. 17, §. 3. The ſyndic of a corporation cannot, without a ſpecial power. L. 34, §. 1.

It cannot be deferred to theſe perſons, becauſe it would be to defer it to them upon ſomething which is not their proper act. L. 34, §. 3, ff. *h. tit.*

§. IV.

Of the effect of the oath deferred, referred, taken or refused.

822. He to whom the oath has been defered ought to take the oath or refer it to him who has deferred it: if he does neither he ought to loſe his cauſe; *Manifesta turpitu-*

dinis & confessionis est nolle jurare, nec jurisjurandum referre; L. 38, ff. *d. tit.*

If the thing upon which the oath has been deferred is not of the act of both parties, but only of him to whom it has been deferred, he will not have the choice to refer it, and will beholden absolutely to take the oath, on pain of losing his cause.

If the party takes the oath which has been deferred to him, therewill result from this oath a presumption *juris & de jure*, of he truth of the thing upon which the oath has been deferid, againſt which no contrary proof can be received, acording to what we have already obſerved in the ſecon ſection.

If he refers the oath, the party to whom it is referred will be holden abſolutely to take the oath, in default of which he ought to loſe his cauſe: if he takes the oath, what he ſwears will kewiſe be holden to be proved without admitting any poof to the contrary. All this is included in the law 24, §. *ſi.* ff. *de jurej.*

When is to the defendant that the oath has been deferred or referred, the oath which he takes that he owes not what is emanded of him, gives him againſt the demand the exceptin *jurisjurandi*, which ought to entitle him to judgment and coſts. This being grounded upon a preſumption *juris & de jure*, it excludes the plaintiff from being heard in offring proof that the party has taken the oath *mala fide*, and has committed a perjury. This is illuſtrated by Julian: *Adversus exceptionem jurisjurandi, replicatio dolo non debet dari, quum prætor id agere debet ne de jurejurando quæratur*; L. 15, ff. *de except.*

He would not be heard in this although he ſhould offer to prove it by papers ſince recovered: in this the deciſive oath deferred or referred by the party, has more force than the ſupplementary oath of which we ſhall treat *infra*, n. 5, Gaius, in the law 31, ff. *de jurej.*, obſerves this difference.

the deceaſed, and he has deferred to me the oath upon the exiſtence of this debt, and I have ſworn that I owed nothing to the deceaſed, this oath will indeed exclude this heir from demanding the ſum; but it will not exclude his co-heir from demanding his part, and if he brings proof that I really owed the ſum to the deceaſed, I ſhall be condemned to pay him his part notwithſtanding the oath which I have made that I owed nothing: for this oath has an effect only in regard to him who deferred it to me and not in regard to his co-heir.

824. Nevertheleſs if one of two creditors *in ſolidum* had deferred to me the oath and I had ſworn that I owed nothing, this oath would alſo exclude his co-creditor; L. 25, ff. *de jurejur.*

There is for this a particular reaſon, which is that the payment of a debt *in ſolidum* to one of the creditors *in ſolidum*, diſcharges the debtor towards all the others; therefore the oath which the debtor has taken that he owed nothing, is equivalent to a payment which he might make to him who defers the oath; *Nam jusjurandum loco ſolutionis cedit*; L. 27: conſequently it ought to diſcharge him towards all.

825. As the deciſory oath is proof only againſt him who has deferred it, ſo it is proof only in favor of him to whom it has been deferred and who has taken the oath, or who has been diſcharged from taking it; L. 3, §. 3, ff. *de jurejur.*

Nevertheleſs if my debtor to whom I have deferred the oath, has ſworn to owe me nothing, I can demand nothing from his ſecurities; for my debtor who has taken the oath, has an intereſt that I ſhould demand nothing from his ſecurities, who might have recourſe againſt him, if they were obliged to pay me any thing: and it is to demand of him indirectly, to demand of his ſecurities; L. 28, §. 1, ff. *de jurejur.*

Quid, vice verſa, if I had deferred the oath to the ſecu-

that when he has recalled his offer he cannot defer the oath a second time.

When the party to whom I have deferred the oath has accepted the condition and declared that he was ready to take the oath, I cannot afterwards recall the offer of the oath; but I may discharge him from taking it and in this case the thing upon which he was ready to take it will be holden to be proved, in the same manner as if he had taken the oath L. 6; L. 9, §. 1, ff. *de jur.*

823. From the principle which we have established, that the decisory oath derives its effect from the agreement implied by the deferring of the oath, between him who has deferred it, and him to whom it has been deferred, it follows also that as an agreement has no effect but in regard to the thing which was the object of the agreement, and between the contracting parties and their heirs, *Animadvertendum est ne conventio in alia re facta, aut cum alia persona, in alia re aliave persona noceat*; L. 27, §. 4, ff. *de pact.*; so also the decisory oath cannot have effect but in regard to the same thing upon which the oath was deferred.

To know whether what is demanded is the same thing upon which the oath has been deferred and which has been determined by this oath, we may apply all the rules which we have established in the preceding section, *art.* 4, to know when what is demanded ought to be presumed to be the same thing with what has been decided by the judgment which has intervened between the parties.

The oath likewise ought not to have effect nor cause the fact upon which the party has sworn, to be holden to be proved, except in regard to him who has deferred to him the oath, and in regard to his heirs and others who succeed to his rights, but it has no effect in regard to third persons: *Jusjurandum alteri nec nocet, nec prodest*; L. 3, §. 3, ff. *de jurejur.*

Therefore if one of the heirs of a deceased person has sued me for his part of a sum which he pretends I owed to

the deceaſed, and he has deferred to me the oath upon the exiſtence of this debt, and I have ſworn that I owed nothing to the deceaſed, this oath will indeed exclude this heir from demanding the ſum; but it will not exclude his co-heir from demanding his part, and if he brings proof that I really owed the ſum to the deceaſed, I ſhall be condemned to pay him his part notwithſtanding the oath which I have made that I owed nothing: for this oath has an effect only in regard to him who deferred it to me and not in regard to his co-heir.

824. Nevertheleſs if one of two creditors *in ſolidum* had deferred to me the oath and I had ſworn that I owed nothing, this oath would alſo exclude his co-creditor; L. 28, ff. *de jurejur.*

There is for this a particular reaſon, which is that the payment of a debt *in ſolidum* to one of the creditors *in ſolidum*, diſcharges the debtor towards all the others; therefore the oath which the debtor has taken that he owed nothing, is equivalent to a payment which he might make to him who defers the oath; *Num jusjurandum loco ſolutionis cedit*; L. 27: conſequently it ought to diſcharge him towards all.

825. As the deciſory oath is proof only againſt him who has deferred it, ſo it is proof only in favor of him to whom it has been deferred and who has taken the oath, or who has been diſcharged from taking it; L. 3, §. 3, ff. *de jurejur.*

Nevertheleſs if my debtor to whom I have deferred the oath, has ſworn to owe me nothing, I can demand nothing from his ſecurities; for my debtor who has taken the oath, has an intereſt that I ſhould demand nothing from his ſecurities, who might have recourſe againſt him, if they were obliged to pay me any thing: and it is to demand of him indirectly, to demand of his ſecurities; L. 28, §. 1, ff. *de jurejur.*

Quid, vice verſa, if I had deferred the oath to the ſecu-

rity and he had ſworn that there was nothing due? The law above cited decides that this oath would avail the principal debtor, becauſe it holds the place of payment, *d.* L. 27. and the payment made by the ſecurity diſcharges the principal debtor.

For the ſame reaſon the oath deferred to one of ſeveral debtors *in ſolidum* avails all the others.

Theſe deciſions apply, provided *de re & non de perſona juramentis juratum ſit:* for if the ſecurity has ſworn only that he did not contract the ſecuritiſhip, the principal debtor cannot derive an advantage from it; L. 28, §. 1, L. 42, §. 1, ff. *de jurejur.* Likewiſe if one of the debtors *in ſolidum* has ſworn that he did not contract the obligation, his co-debtors cannot derive an advantage from it.

From the principle that the deciſory oath derives its effect and its authority from the agreement implied by the deferring of the oath, we may alſo derive this conſequence, that if the party who deferred it, has ſome juſt cauſe of relief againſt the agreement by which he deferred the oath to the other party, he may, in procuring himſelf to be relieved againſt this agreement, cauſe the oath to fail.

Fraud being a cauſe of reſtitution againſt all agreements, if I can prove that it was by a fraud on your part that you induced me to defer to you the oath, I may, upon appeal from the judgment in your favor in conſequence of your oath, or, if this judgment is in the laſt reſort, upon a civil petition againſt this judgment, obtain letters of reſciſſion, by which, without having regard to my having deferred to you the oath, nor to what has followed, the parties will be reſtored to the ſame ſtate in which they were before. We may adduce as an example of fraud, your withholding from me the evidence which eſtabliſhed the claim for a certain ſum that I had againſt you. If upon the ſuit which I have brought for this ſum, not having my evidence, I have deferred to you the oath upon the exiſtence of my claim; as it is in this caſe your withholding my evidence and conſequently your fraud which has induced me to defer

to you the oath, I may, if I come to have proof of this fraud, cauſe myſelf to be relieved againſt my deferring to you the oath, as having been induced to defer it to you through your fraud.

This deciſion is not contrary to the law 15, ff. *de exceptionem*, above adduced, *n.* 822, which ſays, *adversus exceptionem jurisjurandi non debet dari replicatio doli mali:* for the fraud which is ſpoken of in this law, is no other than the perjury which he who has deferred you the oath pretended you had committed in falſely ſwearing not to owe the ſum demanded. He who has deferred you the oath is not received to prove this perjury by adducing more deciſive evidence, although ſince procured; becauſe the oath operates a preſumption *juris & de jure*, which cauſes what you have ſworn to be deemed true and excludes all proof of the contrary. Therefore when you have ſworn to owe nothing, there can no longer be room for the queſtion *an debeatur;* L. 5, §. 2, ff. *de jurejur.* But as the oath has not this authority except as it has been validly made and validly deferred, *quæritur an juratum sit*, §. 2; and he who has deferred it, in order to prove that it has not been validly deferred, is received to prove your fraud, that is to ſay, the manœuvres which you have employed to induce him to defer it to you, ſuch as your having ſtolen or withholden from him the evidence of his claim.

Minority being a cauſe of relief, minors who, by the interpoſition of their tutors or curators, have deferred the oath to the party with whom they were at law, may ſometimes be admitted to relief; but they ought not to be indiſcriminately. They ought not, when, not having at the time of deferring the oath ſufficient proof of the fact on which they deferred it, they have only done, in deferring it, what a prudent perſon in the like caſe would have done. This is illuſtrated by Ulpian: *Si minor detulerit, & hoc ipso captum se dicat, adversus exceptionem jurisjurandi replicari debebit, ut Pomponius ait: Ego autem puto hanc replicationem non semper esse dandam, sed Prætorem debere cognoscere an*

captus sit, & sic in integrum restituere; nec enim utique qui minor est, statim se captum docuit; L. 9, §. 4, ff. *de jurej.*

ARTICLE II.

Of the oath of the party who is examined on interrogatories.

826. When a party exhibits interrogatories upon which he obtains an order that the other party shall be examined by the judge, the oath which the party examined takes, is very different from the decisory oath. The decisory oath is proof for him who takes it, whereas, on the contrary, this is no proof in favor of him who takes it: the answers which the party interrogated makes, are proof only against him, and are none in his favor. The reason of this difference is, that he, who causes the party to be examined on interrogatories, does not do it with the intention to rest the decision of the question on what the party examined may swear, but he puts to him these interrogatories in order to derive for himself some proofs or presumptions from the admissions which the party examined may make, or from contradictions into which he may fall: *ut confitendo vel mentiendo se oneret;* L. 4, ff. *de interr. in jur. fac.*

827. Observe that he who would avail himself of the admissions which a party in his answers to the interrogatories has made, ought not to divide them but to take them entire. If, for example, not having any proof of the loan which I pretend to have made you, of a certain sum of money, I cause you to be examined on interrogatories and in your answers you confess the loan, but add that you have returned the sum, I cannot avail myself of the admission you have made of the loan, and set aside what you added that you returned the sum; but I must take your declaration entire. Therefore if I wished your admission to prove the loan I must admit it also to prove the payment, without your being obliged to make any proof of it, unless I should be able to prove that the payment could not have been made in the time and place in which you have said it was made. See on interrogatories, *Ordinance* 1667, *tit.* 19 & *comment.* by M. Jousse.

ARTICLE III.

Of the oath called juramentum judiciale.

828. The oath called *juramentum judiciale* is that which the judge defers of his own accord to one of the parties.

There are two kinds; I. that which the judge defers for the decision of the cause; it is understood by the general name *juramentum judiciale*: we give it sometimes also the name of supplementary oath, *juramentum supplctorium*; II. that which the judge defers to fix and determine the amount of the judgment he ought to pronounce: this oath is called *juramentum in litem*.

§ I.

Of the oath which the judge defers for the decision of the cause.

829. The use of this oath is established upon the law 31. ff. *de jurej.*, where it is said: *Solent judices in dubiis causis exacto jurejurando secundum eum judicare qui juravcrit*; and upon the law 3, *Cod. de reb. cred.*, in which it is said: *In bonæ fidei contractibus, necnon in cæteris causis, inopia probationum, per judicem jurejurando, causa cognita, rem decidi oportet.*

It results from these texts, that three things must concur in order that there may be room for this oath.

I. It is necessary that the claim or defence should not be fully proved: this results from these terms of the law 3, *Cod. de reb. cred.*, *inopia probationum*. When the demand is fully proved, the judge gives judgment against the defendant without having recourse to the oath, and likewise when the defence is fully proved he gives judgment for the defendant without having recourse to it.

II. It is necessary that the claim or defence, although not fully proved, should not however be altogether unsupported by proof: this is the meaning of these terms *in causis dubiis*, which the law 31 makes use of. It calls by this name those in which the claim or the defence is not fully supported for want of entire and complete proof, nor absolutely unsupported by some inchoate proof which there is: *In quibus, judex dubius est, ob minus plenas probationes allatas*. Vinnius *sel. quæst.* l. 44.

III. It is neceſſary that the judge ſhould enter into an inveſtigation of the cauſe, in order to eſtimate whether he ought to defer the oath and to which of the parties he ought to defer it; this reſults from the terms of the law 31, *causa cognita.*

830. This inveſtigation of the cauſe conſiſts in the examination of the weight of the proof, of the nature of the fact and of the relation of the parties. When the proof of the fact on which depends the deciſion of the cauſe, and which makes the foundation of the claim or of the defence, is complete, the judge ought not to defer the oath, but he ought to give judgment in favor of him who has made the proof.

Nevertheleſs if the judge, for the information of his conſcience, had deferred the oath in this caſe, and the fact upon which he had deferred it was the proper act of the party to whom it was deferred, ſo that he could not be ignorant of it, this party ought not to refuſe to take the oath, and he would not be heard in an appeal from the judgment; for although the judge could and indeed ought, the proof appearing complete, to give judgment in his favor without exacting from him the oath, he has not however done him any wrong in exacting it, ſince it coſts the party nothing to ſwear what he knows to be true: his refuſal to ſwear to this fact leſſens and deſtroys the proof which he had made of it.

831. When the plaintiff has no proof of the fact which makes the foundation of his claim, or when that which he has forms only a very light preſumption, the judge ought not to defer to him the oath, however worthy of credit he might be, and he ought to give judgment for the defendant. Nevertheleſs if theſe proofs, however light they may be, raiſe ſome doubt in the mind of the judge, he may, for the information of his conſcience, defer the oath to the defendant.

Likewiſe when, the claim being proved, the defence ſet up againſt the claim is only ſupported by proofs too light for the oath of the defendant to complete the proof of it,

the judge may, if he thinks proper, for the information of his conſcience, in giving judgment for the plaintiff require his oath.

I would not however adviſe the judges to uſe often this precaution, which ſerves only to give occaſion to an infinity of perjuries. When a man is honeſt, he has no need to be conſtrained by the ſolemnity of an oath not to claim what is not due to him, and not to deny what he ought to admit; and when he is not honeſt, he has no fear of perjury.

During forty years, which I have paſſed in the exerciſe of my profeſſion, I have ſeen the oath deferred an infinity of times, and I have not ſeen it happen more than twice that a party had been reſtrained by the oath from perſiſting in what he had maintained.

832. When the proof of the fact which makes the foundation of the claim is already conſiderable, although it be not entirely complete, the judge ought to decide by the oath of one of the parties: he may even in this caſe defer it to the plaintiff, in order to ſupply by his oath what is wanting in the proof which he has made.

It is neceſſary however to except from this rule cauſes of great importance, ſuch as marriage cauſes, &c. In thoſe cauſes, what is wanting in the proof of the claim cannot be ſupplied by the oath of the plaintiff, and the defendant ought always to have judgment, when it is not fully proved.

In common cauſes, as that which is wanting in the proof which a plaintiff was obliged to make may be ſupplied by his oath, ſo when, after the plaintiff has eſtabliſhed his claim, the deciſion of the cauſe depends upon the proof of the facts which make the ground of the defence of the defendant againſt the claim, and the proof which the defendant is obliged to make is conſiderable, without being entirely complete, the judge may defer the oath to the defendant in order to complete it.

The judge ought alſo in the choice of the party to whom he defers the oath, have regard to the quality of the par-

ties, and consider which is most worthy of credit, or which ought to have most knowledge of of the fact; he ought to determine *inspectis personarum & causæ circumstantiis. cap. fin.* X, *jurej.*

853. Dumoulin, *ad t.* 3, *Col. de reb. cred*, adduces for examples of an incomplete proof, yet sufficiently considerable to be completed by the oath of the plaintiff, 1. that which results from an extrajudicial confession of the debtor, when it has been made not in the presence of the creditor, or when it has been made in the presence of the creditor, indeed, but without being particular and without expressing the cause of the debt.

The books of merchants are also in their favor an incomplete proof of the entries therein in regard to their trade and dealings, which may be completed by their oath, when they are persons of known probity; *supra, n.* 719. Some authors adduce for an example of proof which may be completed by the oath of the plaintiff, the disposition of a single witness, when this witness is a man worthy of credit; but it appears by our law that it is only in very light matters that the disposition of a single witness joined to the oath of the defendant, can entitle him to judgment. See *supra, n.* 783.

834. Although in the suit below, the cause has been decided by the oath which was deferred to one of the parties, this does not prevent the judge of appeal from deferring it to the other party, if he thinks that the question ought to be decided by the oath of this party rather than by the oath of him to whom it has been deferred in the suit below. This we notice every day in practice.

835. A difference remains to be observed between the oath which is deferred by the judge and that which is deferred by a party; to wit, that that which is deferred by a party may be referred to him: whereas when it is deferred by the judge, the party to whom it is deferred must take the oath or lose his cause. Such is the practice of our court which is improperly charged with error by Faber. It suf-

fices, to juſtify it, to attend to the meaning of the word refer; for in order to ſay properly that I refer the oath to my adverſary, it is neceſſary that he ſhould have deferred it to me.

§. II.

Of the oath called juramentum in litem.

836. The oath called *juramentum in litem*, is that which the judge defers to a party, to fix and determine the amount of the judgment which he ought to pronounce in his favor.

The interpreters of the civil law diſtinguiſh two of them; that which they call *juramentum affectionis* and that which they call *juramentum veritatis*.

Juramentum affectionis was that which the judge deferred to me to eſtimate, not the intrinſic value of the thing belonging to me of which I was deprived by the fraud of the adverſe party, but the affection which I had for this thing.

The judge gave judgment in this caſe for the ſum in which I ſwore that I *bona fide* eſtimated my affection for this thing, and this eſtimation might ſurpaſs the intrinſic value of the thing.

It is of this oath that Ulpian ſays, *Non ab judice doli æstimatio ex eo quod interest fit, sed ex eo quod in litem juratur*; L. 64, ff. *de judic.* And further; *Res, ex contumacia, æstimatur ultra rei pretium*; L. 1, ff. *de in lit. jur.*

This *juramentum affectionis* is not uſed in our practice; we have only admitted the *juramentum veritatis*.

837. There is room for this oath whenever the plaintiff has eſtabliſhed his claim for the reſtitution of certain things and there is only an uncertainty reſpecting the amount of the damages which ought to be given againſt the the defendant on default of making the reſtitution of the ſaid things, whereof the value is known only by the plain-

tiff to whom they belong. The judge in this caſe, in order to determine the amount of the damages which he ought to give, takes the eſtimation which the plaintiff may make of the true value of the things, whereof he demands the reſtitution, after the plaintiff has previouſly ſworn to make this eſtimation *bona fide*.

For example, if a traveller had given his portmanteau in depoſit to an innkeeper, and it was there ſtolen; the depoſit being proved and the traveller, who demands the reſtitution of it, having alone the knowledge of what was contained in the portmanteau, the judge in order to determine the amount of the damages he ought to give againſt the innkeeper on default of making the reſtitution required, cannot do otherwiſe than take the oath of the traveller upon the value of the things contained in the portmanteau.

838. Among the Romans, the judge often left the plaintiff an indefinite liberty upon the ſum to which he might ſwear that he eſtimated the things whereof he demanded the reſtitution: *Jurare in infinitum licet*; L. 4, §. ff. *de in litem jur.*

It was however left to the prudence of the judge, when he ſhould think it proper, to limit the ſum above which the eſtimation could not be carried: *Judex potest præfinire cui tum ſummam usque ad quam juretur*; L. 5, §. 1, *d. tit.*

According to our uſages, the judge, after having heard the parties, limits the ſum to the amount of which the plaintiff ought to be believed on his oath upon the value of the things whereof he demands the reſtitution.

He ought to have regard, in fixing this ſum, to the quality of the plaintiff, the greater or leſs probability which appears in his allegations; the nature of the cauſe ought alſo to be conſidered. In this eſtimation one ought much less to ſpare a defendant who ſhould be convicted of being an accomplice in the theft which has been made of the things to be eſtimated, than him who was in fault only by imprudence and want of care.

Although the judge ſhould take, upon this eſtimation, the oath of the plaintiff, without limiting to him the ſum, he ought not to be ſo far bound to regard it, as not to be able to depart from it, if he found it exceſſive: *Etsi juratum fuerit, licet judici absolvere, vel minoris condemnare;* L. 5, §. 2, ff. *d. tit.*

THE END.

ERRATA.

Page.	Line.				
22,	26,	for	*could,*	read	*could not.*
97,	3,		*valuable,*		*invaluable.*
111,	6,		*of the,*		*the.*
123,	20,		*required,*		*acquired.*
168,			§. 4,		§. 1.
170,	last,	after	*shall,*	add	*see*
200,	3,	for	*he,*	read	*be.*
2[illegible],			§. II.		*Section the Second.*
299,			*Section the Second,*		*Section the Fourth.*


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